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REPORTS OF CASES

DETERMINED IN

THE SUPREME COURT

OF THE

STATE OF CALIFORNIA.

CURTIS J. HILLYER,

REPORTER.

Volume 22.

SAN FRANCISCO:
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1864.

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JUSTICES
OF
THE SUPREME COURT,
DURING THE TERM OF THESE REPORTS.

HON. W. W. COPE	CHIEF JUSTICE.
HON. EDWARD NORTON	} ASSOCIATE JUSTICES.
HON. E. B. CROCKER.....	

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APRIL TERM, 1863.

REPORTS OF CASES

DETERMINED IN

THE SUPREME COURT,

APRIL TERM, 1863.

PEOPLE *ex rel.* BURR *v.* DANA *et al.*

EAST Street, San Francisco, extends from Folsom to Market Street, the latter and not Jackson Street being its northern terminus.

It is a cardinal rule of interpretation that a statute must be construed with reference to the objects intended to be accomplished by it.

The object of the Act of 1851, commonly called the "Water Lot Act," was to provide for the disposition of the water lot property, and not to interfere with the location of streets; and the designation therein of one of the boundaries of that property as the "eastern line of East Street to its point of intersection with the northern line of Jackson Street," was not intended, nor did it operate to extend East Street northward to Jackson.

Jacobs v. Kruger (19 Cal. 411) affirmed.

Where an act of the Legislature, providing for the disposition of State property, exempted from its provisions that portion of the property "known as the Government Reservation," except as to certain leasehold estates therein which were confirmed: *held*, that whether the reservation had any legal existence or not, was immaterial; all that was known by that name being exempted from the operation of the act except as to the leases confirmed by it.

The reservation attempted to be made on behalf of the United States Government in 1847, by the military officers then exercising authority at San Francisco, embraced all the lots lying between Montgomery Street on the west and deep water on the east, and by "deep water" was meant the place used as an

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anchorage for vessels, the intention being to fix the eastern boundary at some undefined point in the bay beyond the line of the city front.

Where the Legislature, at the time of the passage of an act concerning water lots in San Francisco, had before it an official map of that city upon which was marked a selection called the "Government Reservation," to which map reference was made in the act: *held*, that the map must be regarded as a part of the act, and that the Legislature, in speaking of the reservation, must be presumed to have intended what was marked on the map as such.

APPEAL from the Twelfth Judicial District.

The complaint avers, that in the City of San Francisco there is a street known as "East Street," which is one hundred and thirty-seven and a half feet wide, and extends from Jackson to Folsom Street; that by an Act of March 26th, 1851 (generally known as the Water Lot Bill), it was provided that all the lots within certain boundaries therein named were known and designated as beach and water lots, and the eastern line of East Street, from Jackson to Folsom streets, was declared to be one of the boundaries of said beach and water lots, which provision was intended for the purpose of establishing, opening, and dedicating East Street to public use as a street; that by the Act of April 26th, 1858, it was provided that all the streets within the water line front of the city, as laid down on the official map and high water mark, and all the streets mentioned and referred to in the aforesaid Act of March 26th, 1851, to the full extent of said streets as laid down on the map or plat of J. J. Gardiner, Surveyor, were confirmed, established, and dedicated to the public use as streets; that East Street is one of the streets so confirmed, established, and dedicated; that it is the street mentioned and referred to in each of the aforesaid acts; that it is one of the streets lying between high water mark and the water line front of the city; that it is one of the streets laid down on the official map, and also on Gardiner's map; and that the foregoing provision was inserted in the Act of 1858 for the purpose of establishing, confirming, and dedicating East Street to public use as a street; that on June 26th, 1856, the Board of Aldermen and Assistant Aldermen of the city passed an ordinance, which was approved by the Mayor, declaring East Street open from Folsom to Clay Street, and

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dedicating it to public use as laid down on the official map; that on June 30th, 1856, the said Board of Aldermen and Assistant Aldermen passed another ordinance, which was approved by the Mayor, declaring East Street open from Clay to Jackson Street, and dedicating it to public use as a street as laid down on the official map; that for more than six years last past East Street has been and is now a common and public highway or street for the people of the State, and during said time has been repaired from time to time at the expense of the property owners adjoining the street, and at the expense of the inhabitants of the city by means of assessments upon the adjoining lots or blocks by virtue of certain Acts of the Legislature; that all the people of the State ought to have a free right of transit over said street, but that defendants have lately obstructed said street with buildings from Clay to Jackson Street so as to prevent travel over the same, and they threaten to continue said obstructions; that unless said obstructions are removed all travel over said street will be thereby prevented, and that said obstructions are a public nuisance; that the relator and other citizens have often requested the defendants to remove the nuisance, but they refuse to do so, and falsely pretend that the ground covered by said buildings is not a public street.

The prayer is that the defendants be required to abate the nuisance and be enjoined from continuing it.

The answers of defendants admit there is in said city a street called East Street, but deny that it extends from Folsom to Jackson Street; on the contrary, they aver it only extends from Folsom to Market Street. They admit that by the Act of March 26th, 1851, the eastern line of East Street, from Folsom to Jackson, is designated as one of the boundaries of the beach and water lots, but deny that such boundary was inserted for the purpose of establishing, opening, or dedicating East Street, or that it was established or dedicated as a public street by said act, or that it was the object of the act to extend, open, or dedicate East Street beyond the actual limits of it as laid down on the official map referred to in the act; and they aver that the act, in bounding the beach and water lots by an extension of the east line of East Street to the north line of Jackson Street, intended only the protraction of said

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line as a single line, to mark and indicate the boundary of the permanent water front of the city, and not for the purpose of extending East Street. They deny that it was the intention of the Act of April 26th, 1858, or that said act operated to establish and dedicate or extend East Street between Market and Jackson; and they aver that even if such extension and dedication were contemplated by the act, the same was null and void as against the defendants, who are and were, long before the passage of the act, the *bona fide* owners of the property claimed in the complaint to constitute East Street; and they aver that no proceedings had been had for the purpose of condemning the property for the purposes of a street, or for extending or establishing East Street from Folsom to Jackson, nor any mode provided or attempted for compensating the defendants for said land. That if any such ordinances were passed as described in the complaint, they were null and void; because no provision was made for ascertaining the value of said lands to be so dedicated, and none for compensating the defendants who owned the land. They deny that East Street was ever extended from Folsom to Jackson Street either in law or in fact; or that what is claimed as East Street, between Folsom and Jackson, was, or ever has been, or is now, used as a public street or highway, or that the same has been repaired as stated in the complaint, or that any one ought now, or at any time, to have the free use of said land as a street. They admit that they have erected buildings on the land, but deny that these buildings obstruct any portion of East Street. They aver that the buildings were erected more than six years ago, during all which time they have been in the peaceable occupation and enjoyment of them. They admit that they intend to continue and maintain the said buildings, and deny that in doing so they will commit a nuisance or inflict a wrong upon the public; and deny that the land in contest has ever been or is now set apart for and used as a public street or highway, or has been since 1851 repaired at the expense of any one.

All the testimony in the case was taken and reported by a referee appointed by the consent of the parties, and upon his report and the pleadings judgment was rendered by the Court in favor of the plaintiffs. The defendants moved for a new trial, which motion

was denied, and the defendants have appealed both from the original decree and the order denying a new trial. The evidence, so far as it is material, is stated in the opinion of the Court.

Crockett & Crittenden, Baldwin & Haggin, and S. Heydenfeldt, for Appellants.

I. The water lot bill did not have the effect to dedicate the street, because

1st. The first, fourth, and fifth sections were designed only to establish boundaries, and for no other purpose. (*People v. Kruger*, 19 Cal. 411.)

2d. The Government Reserves are expressly excepted from the operation of the act, except for the purpose of confirming the title of the lessee.

3d. It would have closed up the public slips, which it was not the purpose to do, as is plain from the first and second sections of the Act of May 1st, 1851. (See Session Acts, 1851, 311.)

4th. By the water lot bill, no street or open space adjoining the water front, is left between Jackson and Pacific; and it is, therefore obvious, that it was not the design to leave an open thoroughfare all around the city front.

5th. That in calling for the lines of streets, it refers only to the lines to be extended, is evident from the fact that a majority of the streets called for had not then been opened, or extended; and if calling for the lines is to operate as a dedication, when no street had in fact been opened, or laid down on the map, then it would extend and dedicate Simmons Street from its southern end to the south line of the city; (see last call in the bill, end of first section); and Davis Street north of Pacific—Jackson, Pacific, Broadway, and in fact almost every street called for.

6th. The water lot bill does not convey the fee to the city; but only the use for a term of years; and the sole object of the first section is to define the boundaries, and not to open or dedicate streets.

7th. The city was then a corporation, with full power to open, dedicate, and regulate streets; and there is no reason to infer that the Legislature intended to abridge or interfere with this power.

8th. If it had been intended to open or dedicate streets, the act would have explicitly declared it. Dedication ought to be by clear and explicit acts, before the owner will be presumed to have surrendered his property to the public. (*Badean v. Mead*, 14 Barb. 321.)

9th. Subsequent legislation shows that the water lot bill, in calling for the line of East Street, only used it as a boundary line, and not as a dedication of the street.

See act to confirm certain contracts for building wharfs. (Acts 1851, 313.) Also, acts to provide for the sale of the State's interest in said land. (Acts 1853, 219.) This act excepts the slips, seventh section, but orders the Government Reserves to be sold; also, act to provide for the sale of slips, and dedicating the streets named in water lot bill. (Acts 1858, 325.) Also, act declaring original streets, as laid down on official map, and all others dedicated to public use, to be open public streets, and directing Supervisors to ascertain and establish the width. (Acts 1859, 135.)

II. If the water lot bill had, in express terms, extended and dedicated East Street to Jackson, the State being the owner of the soil, the Legislature had the power to revoke the dedication, except so far as private rights have vested under the dedication. The holders of these rights may have their redress by an appropriate action, when they are invaded; but the property is entirely under the control of the State, subject to such easements as private persons have acquired, and the public at large cannot complain, if the State chooses to sell its property, instead of allowing it to be used as a street. (*Clements v. West Troy*, 16 Barb. 251; *City of Oswego v. Oswego Canal Co.*, 2 Selden, 257.) If East Street were in fact dedicated, the dedication was revoked by the sale of the property by the State, under the Acts of 1853-1855.

III. The city acquired no title to such parts of the land within the water lot boundary, as are embraced in the Government Reserves; but even were it otherwise, the State had the power to reclaim it at any time whilst the title was in the city. Municipal corporations are entirely under the control of the Legislature, and may be altered or abolished at pleasure. They have no vested public rights which the Legislature may not take away. (*Angel & Ames on Corp. Secs. 30, 31.*)

IV. The public as such, can acquire no vested right save those protected by the Constitution, which the Legislature may not abolish; and the right of the public to use a highway, is entirely subject to legislative control, whether it lie within or without the limits of a municipal corporation; and the sale of the property by the State, defeats any public right to use it as a highway, unless by compensation to the owner. Any other rule would make a highway perpetual; and when once established, it could never be altered or abolished, even by a legislative act.

V. The proof establishes conclusively, that the Government Reserve extended to ship's channel towards the east, and was not limited by the city front; and, therefore, the city acquired no title to this land under the Act of March 26th, 1851. The title of the lessee and of the State having vested in the defendants, the city had no power, by ordinance, to open the street without compensation to the owners.

VI. If, however, the reserve was limited to Front Street, so that the city acquired under the water lot bill, the title to the lands east of Front Street, her title was divested by the execution sales, and passed to the defendants, after which the city had no power to open the street, without compensation to the owners.

Nathaniel Holland, for Respondents.

I. East Street was dedicated as a public highway by the original plan of the city. The question of fact involved in this proposition is apparent upon the examination of the grant of Gen. Kearny to the town of San Francisco of the beach and water lots made the tenth day of March, 1847. One of the conditions of the grant was, that the town authorities should divide the "ground into lots." Immediately after the delivery of the grant, and in compliance with the conditions, the authorities caused a survey, and a plan, or map, to be made by the then official Surveyor, Jasper O'Farrell, who completed the survey and plan of the ground on the sixteenth day of July, 1847, which survey was accepted by the authorities. The map is known as the O'Farrell Map. This map was the first one made by any authority of the beach and water lots, and was accepted and adopted as the plan of the town. By the making

and accepting the map, taken in connection with the grant of Gen. Kearny, a street thereby is dedicated, extending through the entire water front, and lying between the bay and the lots sold by the authorities of the town of San Francisco.

II. East Street was dedicated by positive enactment. (Act of March 26th, 1851, entitled "An Act to Provide for the Disposition of certain Property of the State of California;" Act of May 5th, 1858, on same subject.)

The Common Council of the City of San Francisco, on the twenty-sixth of June, 1856, passed an ordinance declaring East Street, from Clay to Jackson Street, a public street.

In 1855, J. J. Gardiner, City and County Surveyor, made a map of the city and county. Upon this map, East Street is laid down from Folsom to Jackson Street as claimed by respondents; and the Legislature by another act, passed April 26th, 1858, declared all the streets laid down upon that map, also all the streets referred to in the Act of March 26th, 1851, open public streets.

III. The street was dedicated by actual usage. (See evidence.)

IV. The appellants have no title either legal or equitable. Because: 1st, the reserves under which they claim never extended as far east as East Street; and, 2d, they have acquired no title by execution; and, 3d, they have derived no valid title from the State.

The only point considered by the Court in the case of *Jacobs v. Kruger* was the construction of the Act of March 26th, 1851, and the Court seems to have read the act by inserting the word "protracted" so as to make it read thus "thence northerly on the eastern line of East Street protracted to its point of intersection with the northern side of Jackson Street." The facts in this case are different from those presented in that.

In the case of *Wood v. City of San Francisco* (4 Cal. 190) the Court held, in construing the Act of March 26th, 1851, that it was not necessary that the street should be marked upon the map. In that case, the streets were not marked in any way, and the Court held, "Where a city is laid out with streets running to the water,

such streets should be held to continue on to high-water mark." The Chief Justice in that case, says: "In view of the importance of this principle as well as in its consequences, I can come to no other conclusion than that all the public streets of the City of San Francisco running into the water or laid down on the official map of the city were by the operation of the Act of March 26th, 1851, extended and carried to the front line of the city, and as such are subject to the free enjoyment of the public."

This is just the principle involved in the question presented in the case at bar. It has been clearly shown by the testimony, that Clay, Washington, and Jackson streets terminate at the west line of East Street, and upon the principle of the case recited, East Street is carried along the water front precisely in the same manner as Broadway was to the eastward of Front Street.

COPE, J. delivered the opinion of the Court—FIELD, C. J. concurring.

This is an action to abate a nuisance caused by the erection of buildings upon what is alleged to be a public street in the City of San Francisco, known as East Street. The case is important simply in its public aspect, and the value of the property to be affected by its decision; the principles involved are of little consequence. The only question is whether East Street extends along the water front of the city from Folsom Street to Jackson Street, as the plaintiffs contend, or merely from Folsom to Market, as is contended by the defendants. The buildings complained of are situated between Washington and Jackson streets, and the property is claimed by the defendants under a title derived from the State, and under a purchase at an execution sale as the property of the city. There is no question of the validity of their title, unless the property had been dedicated to public use as a street.

The plaintiffs contend that the property had been so dedicated, and in support of their position they rely chiefly upon an Act of the Legislature passed in 1851, commonly known as the Water Lot Act. It is entitled "An Act to provide for the disposition of certain Property of the State of California," and the property is described by metes and bounds, and designated as the "San Fran-

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cisco Beach and Water Lots." It provides that the boundary line therein set forth shall be and remain the permanent water front of the city, and gives to the city, with certain exceptions, the use and occupation of the property described for the term of ninety-nine years. One of the boundaries given is the "Eastern line of East Street, to its point of intersection with the northern line of Jackson Street;" the initial point of the boundary thus given being on the southern line of Folsom Street. On the official map of the city, which was before the Legislature when the act was passed, East Street is laid down as extending only from Folsom Street to Market, and there is no evidence that it extended north of Market Street prior to that time. It is claimed that the reference in the act to its eastern line as a boundary, operated as an extension and dedication of it from Market Street to Jackson.

This point was before us in *Jacobs v. Kruger* (19 Cal. 411), and we there held that the construction contended for was inadmissible; that the dedication of a street was foreign to the purposes of the act, and not within the intention of the Legislature. It is a cardinal rule of interpretation that a statute must be construed with reference to the objects intended to be accomplished by it, and the only object of the act in question was to provide for the disposition of the water lot property. Its provisions point to that object alone, and it is impossible, if we are to be governed by the ordinary rules of construction, to regard a mere reference to a street for the purpose of designating a boundary as extending the street itself. The intention of the Legislature was merely to establish a boundary, and the eastern line of East Street was adopted for convenience and certainty in fixing its location and course. This is the more apparent from the fact that the boundary established is longer than the eastern line of East Street, even if the street were extended, its initial and terminating points being separated from that street by Folsom Street at one end, and by Jackson Street at the other. These points could only be ascertained by protracting the line at each end of the street; and as the protracted line was necessarily in the mind of the Legislature, there is no ground for supposing that the intention was to extend the street. It is superfluous, however, to discuss the question, for the case cited is directly in point,

and we see nothing in the arguments of counsel to justify us in overruling it.

In addition to this, the defendants claim that the property is a part of the property formerly known as the Government Reservation, which, except in one particular, was exempted from the operation of the act. The act provides that "the property known as the Government Reservation is exempt from the operation of this act; except that any estate held by virtue of any leases, executed or confirmed by any officer of the United States on behalf of the same, shall be and the same are hereby granted and confirmed to the lessees thereof." It appears that the reservation referred to consisted of three distinct parcels of land, and that it was made by officers of the United States for the use of the Government in the erection of buildings and wharfs. The parcel of which this property is claimed to be a part, is bounded on the west by Montgomery Street, on the north by Jackson Street, and on the south by Washington Street, and the only question is as to the boundary on the east. The plaintiffs contend that the eastern boundary is Front Street, and that as the property in controversy lies east of that street, it was not included in the exemption, but came within the general provisions of the act. It is immaterial, of course, that the reservation had no legal existence, the property belonging to the State, and all that was known by that name was exempted from the operation of the act, except as to the leases confirmed by it. The defendants claim under a lease thus confirmed, and the matter resolves itself simply into the inquiry as to what was known at the date of the passage of the act as constituting the reservation.

We do not propose to state at length the evidence on this point, but shall refer to such portions of it as we deem most material and conclusive. On the tenth of March, 1847, General Kearny, Military Governor of California, executed a paper purporting to be a grant to the town of San Francisco, of the beach and water lots lying on the eastern front of the town within certain limits, but reserving such lots as should afterwards be selected for the use of the Government. On the twenty-third of June, W. T. Sherman, A. A. General, addressed a letter from headquarters at Monterey, to Major Hardie, at San Francisco, directing him, in connection

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with the senior officers of the army and navy at that point, to make the selections referred to in the grant; the selections to be such as were best suited for wharfs for army and navy purposes, with space enough for the erection of buildings, etc. On the receipt of this letter Major Hardie proceeded to make the selections, and on the eighteenth of July addressed a letter to the Alcalde of the town, notifying him that the lots intended to be reserved had been selected, stating their respective locations and boundaries, and giving as the eastern boundary the bay, running out to deep water. In connection with and as a part of these transactions a survey was made and a map prepared under the direction of the town authorities, and the selections are laid down on the map as extending indefinitely to the east, in accordance undoubtedly with the understanding of the authorities upon the subject. The map is referred to by Major Hardie in describing the reserved property, and is thus made a part of the description, and we regard it, in connection with this letter to the Alcalde, as conclusive evidence of the extent of the selections. The selections are indicated upon it by the words "Government Reserve," and by dotted lines extending east of Front Street towards the deep water of the bay, showing, of course, that the assumption of the plaintiffs as to the eastern boundary is unfounded. The only evidence sustaining it is contained in the testimony of Lieutenant Gibson, who, in 1849, at the request of Captain Keyes, then in charge of the property for the Government, made a map or sketch fixing the boundary at Front Street; but the facts stated prove beyond question that he was mistaken in his view of the matter. Captain Keyes states that he took possession of the property in August, 1849, and had charge of it until he leased it by order of General Riley, late in the fall of that year, and that he was governed in regard to its extent by the letter of Major Hardie to the Alcalde. The leases executed by him designate as the boundary on the east the limits of the town or deep water, and the clear result of the evidence is that the selections embraced everything necessary to preserve an open and unobstructed communication with the bay. In other words, that they embraced all the lots lying between Montgomery Street on the west and deep water on the east, and it is obvious that the deep water

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referred to was that used and occupied as an anchorage ground for vessels. There can be no doubt of the correctness of this view of the extent of the selections as originally made, and the only further question is as to the limits to be assigned to them under the provision of the Act of 1851, exempting them from its operation.

When the act was passed the Legislature had before it the official map of the city, compiled in 1851 by W. M. Eddy, which map is referred to in the act itself, and must be regarded as a part of it. On this map the selections are marked as extending east of Front Street to and beyond the eastern front of the city as there laid down, which was adopted and established by the act as the permanent water front of the city. Their position and extent are indicated in the same manner as upon the map previously alluded to, and it is impossible to draw but one conclusion as to the understanding of the Legislature in regard to their eastern boundary. The understanding undoubtedly was that they had no definite boundary on the east, but were open slips, extending not only to the city front, but beyond it, and terminating in the bay. The map is the most authoritative evidence in the record as to what was known at that time as constituting the reserved property, and we regard it as decisive of the question. The property is delineated upon it in accordance with our view of the selections as originally made, and in conformity, as we are satisfied, with the general understanding upon the subject.

Our conclusion on this point covers the entire case, and the judgment is reversed and the cause remanded with instructions to the Court below to dismiss the action.

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People ex rel. Burr v. Dana, *ante* page 11, affirmed as to the extent of "the Government Reservation" in San Francisco, and its exemption from the operation of the Water Lot Act of 1851.

The fact that one of the Judges who participated in a decision of this Court concurred in by only two Judges, did not hear the oral argument, does not ren-

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der the judgment absolutely void. It is an irregularity which may be waived by the parties.

Thus, where previous to the argument of a case the counsel on both sides agreed that one of the Judges might participate in the decision, although he should not be present at the oral argument, and that Judge, not having heard the argument, subsequently, in connection with one of the other Judges, rendered a decision: *held*, that the judgment was valid, the requirement of the statute as to the presence at the argument of the Judges making the decision, having been waived by the agreement.

This Court loses all control and jurisdiction over a case after the *remittitur* has been filed in the Court below.

A motion, therefore, to vacate a judgment on the ground that it was not rendered by the proper members of the Court, cannot be entertained after the *remittitur* has been filed below.

APPEAL from the Twelfth Judicial District.

This was an action of ejectment to recover part of a block lying between Front, Pacific, Broadway, and Davis streets in San Francisco. The plaintiff claimed title under the City of San Francisco, and the principal question involved was whether the premises were part of the "Government Reservation" mentioned in the Beach and Water Lot Act of 1851, and were as such exempted from the operation of that act. Defendants had judgment in the Court below and plaintiff appeals. The case was argued by Nathaniel Bennett for appellant, and by Hoge & Wilson for respondents, and a decision was rendered by Justice COPE—FIELD, C. J. concurring—affirming the judgment on the authority of the preceding case of *People ex rel. Burr v. Dana*, in which the same question was considered and determined. Judgment was entered accordingly upon which, after the lapse of ten days, a *remittitur* was issued and filed in the Court below. Subsequently a motion was made to vacate this judgment on the ground that Justice COPE had not been present at the oral argument. The facts in reference to this motion appear in the opinion.

Nathaniel Bennett, for the motion.

J. P. Hoge, contra.

Per CROCKER, J.—This is a motion by the appellant to set aside the order of this Court affirming the judgment of the Court below,

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and proceedings subsequent thereto, both in this Court and the Court below. The ground of this motion is that the judgment was rendered without the concurrence of two of the Justices of this Court who were present at and heard the oral argument of the case. It is founded upon the affidavit of the appellant, which sets forth, substantially, that the case was orally argued before Justices FIELD and NORTON, in the absence of Justice COPE, that no other argument has been had except the filing of printed briefs; that the case was decided by Justices FIELD and COPE, Justice NORTON taking no part in the decision; that a *remittitur* has been sent to the Court below and a judgment entered thereon, on which the defendants are about to issue execution.

Sec. 10 of the act organizing this Court provides that "the presence of two Justices shall be necessary for the transaction of business, excepting such business as may be done at chambers; and the concurrence of two Justices who have been present at and heard the arguments shall be necessary to pronounce a judgment. If two who have been present at and heard the arguments do not concur, the case shall be reheard."

The counsel for the appellant admitted, on the argument of this motion, that the counsel for both parties agreed with Justice COPE, before the case was argued, that he might participate in the decision, although he should not hear the oral argument, and under this agreement he left for San Francisco and was not present when the case was argued and submitted. It seems that Justice COPE had heard the argument in another case which involved the same question, and as the counsel intended to and did file elaborate briefs, there was the less necessity for his presence when this case was orally argued.

It has been repeatedly and uniformly decided by this Court that it loses all control and jurisdiction over a case after the *remittitur* has been filed in the Court below. (*Grogan v. Ruckle*, 1 Cal. 194; *Mateer v. Brown*, Id. 231; *Leese v. Clark*, 20 Id. 387.) In the last case this Court says: "The Supreme Court has no appellate jurisdiction over its own judgments; it cannot review or modify them after the case has once passed, by the issuance of the *remittitur* from its control. The Court cannot recall the case and

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reverse its decision after the *remittitur* is issued." In order, therefore, to afford parties who may desire it an opportunity of moving for a rehearing, or to amend, modify, or set aside the judgment, one of the long standing rules of this Court is, that no *remittitur* to the Court below shall issue until the expiration of ten days after the judgment is rendered, except by consent of the parties or a special order made upon notice. No excuse is shown why this application was not made within the ten days allowed by the rules of this Court, or before the Court had lost control of the case by filing the *remittitur* in the Court below.

Under all the circumstances of this case we think it clear that the appellant has waived the objection on which this motion is founded. The agreement made between the counsel and Justice COPE, and the failure to make the objection before the *remittitur* was filed in the Court below, are either of them a waiver of the objection.

The statute of New York upon this subject provides as follows: "Nor can any Judge decide or take part in the decision of any question which shall have been argued in the Court when he was not present or sitting therein as a Judge." This law is prohibitory in its terms, and yet it was held that an order "is not void for the reason that one of the three Judges who composed the Court when the decision embodied in the order was pronounced did not hear the argument of the motion." (*Corning v. Slosson*, 16 N. Y. 294.)

We do not agree with the counsel for the appellant that the mere fact that one of the Judges who participated in a decision concurred in by only two Judges did not hear the oral argument renders the judgment absolutely void. We consider it an error or irregularity which may be waived by the parties, and that it has been done in this case.

The motion is denied.

NORTON, J.—A motion is made in this case to set aside the judgment entered in this Court, and all subsequent proceedings, upon the ground that the judgment was not pronounced by two Judges who were present at and heard the argument. The facts are that the case was argued orally before two Judges and that full

briefs were subsequently submitted to the Judges. When the case was about to be called, either on the same day or day before, one of the three Judges stated in the court room, during the time of a recess, that he was about to leave the city and should be absent when the case was called. Thereupon the counsel for the respective parties, after expressing a desire that he should hear the argument, agreed that he should participate in the decision or consideration (the precise word not being remembered) of the case, although not present at the oral argument. This Judge and one of the two who heard the oral argument concurred in the judgment. The other Judge who heard the oral argument did not concur.

It has never been considered that the statute requiring that two Judges who heard the argument should concur in pronouncing the judgment necessarily required all cases to be argued orally, but on the contrary a large portion of the cases before the Court are submitted on briefs and decided without any oral argument. This is done simply by submitting the cases on the briefs without any written stipulation of the parties.

The agreement between the counsel above mentioned was a stipulation that this case might be heard orally before two Judges and submitted to the three on briefs to be filed. There is no room for the suggestion that this agreement could be considered as providing that the third Judge should participate in consultation about the case but not participate in the decision. He was to participate in the proper disposition of the case, and that includes the pronouncing of the judgment. It would have been idle and frivolous to agree that he might merely give his advice to the other Judges. The purpose of the stipulation was obviously to meet the contingency that the two Judges who heard the oral argument might not agree.

The stipulation above referred to was not reduced to writing, but the counsel for the parties, and between whom the stipulation was made, now agree in open Court upon its terms so far as essential to this motion, and the moving party does not rely upon the fact that it was not reduced to writing, but merely claims that its terms did not amount to a waiver of the statutory provision that two Judges who had heard the oral argument must concur in the judgment.

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We think this is not the proper effect of the stipulation, but that it authorized the three Judges to dispose of the case after the briefs should be submitted in the ordinary way of disposing of cases submitted on briefs, and that it was competent for counsel to make such a stipulation in regard to the mode of considering and deciding the case.

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F., WHILE employed as boat captain by the defendant, a corporation, subscribed for its stock to the amount of \$2,000, and shortly after advanced to the company eight hundred and twenty dollars upon a verbal condition that if he should be retained in his position as captain the money should be applied on his stock subscription; but otherwise should be considered a loan, and repaid. F. was soon after discharged from the employment, and then assigned his demand to plaintiff: *held*, that plaintiff was entitled to recover of defendant the amount advanced as money had and received.

The authority of an agent of a private corporation to bind it by a contract for borrowing money may be shown without proof of a resolution of the Board of Trustees directly conferring the authority, or of any formal ratification by them of the contract. It may be inferred from proof of the character of the agency, of the acts of the agent, and the knowledge of the officers and directors of his habit to make similar contracts and their acquiescence in the same, and the fact of the money being applied to the use of the corporation.

APPEAL from the Sixth Judicial District.

This is an action brought by Easton Allen, as assignee of one Farris, to recover of the Citizens' Steam Navigation Company, a corporation, the sum of eight hundred and twenty dollars, which, in 1854, was paid by Farris to one Chapman, then the agent of defendant. Farris was at the time employed as captain of one of defendant's boats and was solicited by Chapman to subscribe to the stock of the company, and expressed his willingness to do so, provided that he could retain his berth as captain. With that understanding, he subscribed \$2,000, and shortly after advanced to Chapman eight hundred and twenty dollars under an agreement with him that if his employment as captain continued it should be

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applied as payment on the subscription ; but if not, that the amount should be repaid.

Early in 1855, Farris was discharged from employment and he soon after assigned his demand against the company to plaintiff. The points principally controverted on the trial were : 1st, the exact terms of the agreement and its effect ; 2d, the authority of Chapman to bind the corporation by a verbal agreement ; and, 3d, whether certain subsequent acts and conversations of Farris operate as an estoppel. On the first point, Farris testified :

“ In 1854, along in July or August, I went to work as captain of the ‘Enterprise,’ running from San Francisco to Marysville. Eben Chapman was agent of the company, and hired me to go on the boat. I ran the ‘Enterprise’ as captain of the boat. After I was on the boat, Mr. Chapman wanted me to take some stock. I told Chapman I would take \$2,000 of it—would subscribe for that amount, provided I retained the situation I then had. If I did not, I did not want the stock. I did subscribe under that consideration, that I would take that amount if I retained the situation. I loaned Chapman three hundred or three hundred and twenty dollars, and after that five hundred dollars, with the understanding that if I took the stock I was to retain the berth, and that this money should go on the stock I subscribed for, but if I did not keep the situation, it was to be paid back by him, Chapman, from the company. I loaned it to Chapman for the company. Wanted it on Saturday night to pay off the hands that had worked for the company.”

As to Chapman’s authority, he himself testified :

“ I was in the habit of raising money sometimes by drawing on the Secretary of the company, at Marysville—sometimes by getting notes discounted—notes which I gave as agent, and sometimes giving my own note, and getting a friend to indorse for me. I think we got through building in October, 1854. I cannot state the amount precisely that I borrowed, as I sometimes borrowed and paid shortly afterwards. I suppose it could not fall short of \$80,000. At the time we finished building, the company owed me from \$20,000 to \$25,000, of money borrowed by me. When I would write to them for money, as I frequently did, I would receive

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instructions from the Secretary to raise money here, as none could be raised in Marysville. The company gave me no direct instruction about the employment of Farris. He continued on the boat for some time—some two months, more or less. The boat was laid up after running some two months, for repairs, and Captain Summers was then appointed by the company. The understanding when Captain Farris subscribed was that the money he paid should be returned unless he retained his berth on the boat. After the captain was displaced from the 'Enterprise,' he said to me that he wanted me to pay him back the money. The money I received from Farris was paid out for the company, principally I think, in the running account of the 'Enterprise.'

Letters from the officers to Chapman, written shortly previous to the transaction, were produced, in one of which the Secretary said: "Herewith you have all the authority from the Board of Directors that you require to ruin us all, or at least to run us into debt so deep that we shall wish ourselves out again." And in another: "I hope you will select some good man for the Enterprise." And again: "How much money will you want to clear the boat, and send her afloat clear from debt?"

On the question of estoppel, defendant proved that on the ninth of March, 1855, Farris rendered an account against the company of debits and credits, upon which he had a settlement with the company. In this account no mention was made of the demand on which this action was brought; that on the thirtieth of April, 1855, Chapman had another settlement with said company. In his account, consisting of debits and credits, no mention is made of the demand on which this action was brought. This account, Chapman verified as a complete statement; and in his verification thereof, he stated that the demand sued on in this action was due from him to said Farris, and was in nowise connected with the business of said company. Chapman also testified that in January, 1855, Farris called on him for the eight hundred and twenty dollars, and to a question in the following words: "Was nothing done by the company to recognize the indebtedness alleged by Farris?" he made the following answer: "It was never rendered in my account between myself and the company. It was kept out by mutual understanding between myself and Farris."

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The Court found: 1st, that the respondent through its authorized agent, E. Chapman, on the twenty-seventh of August, 1854, borrowed of one John R. Farris, the sum of three hundred dollars, and on the fourth of September, 1854, borrowed from the same John R. Farris, the further sum of five hundred dollars, with the understanding that if the said Farris kept his situation as captain of the steamboat "Enterprise," it should apply on account of his stock subscription, otherwise not—and that the same has never been paid either in whole or in part; 2d, that said claim was duly assigned to plaintiff. On these findings, judgment was rendered for plaintiff. Defendant moved for a new trial, which was denied; and from this order and from the judgment he appeals.

John Currey, for Appellant.

I. It does not appear, by the evidence, that Chapman had any authority to make any contract with Farris to give him a permanent situation, or to agree to any conditions to be annexed to the subscription which Farris proposed to make for stock; nor does it appear that Chapman agreed to any such conditions.

Parol evidence of a previous or cotemporaneous *colloquium*, or of conversations or declarations at or before or after the time when the contract is reduced to writing and signed, is inadmissible. (1 Green. Ev. Secs. 275–277; Starkie's Ev., Part VI, 995–1010; *Mumford v. Hallett*, 1 John. 439; *Rankin v. Am. Ins. Co.*, 1 Hall, 619; *Creery v. Holly*, 14 Wend. 26.

II. Chapman and Farris, by a collusive arrangement, attempted to defraud the company of the principal sum of money sued for in this action.

The conduct of both Chapman and Farris, was to induce the company to act otherwise than they would have done if the truth had been stated—if, in fact, the truth respecting this demand be as Farris now pretends.

If the claim had been made by Farris against the company before the settlement with Chapman, and they had deemed it proper to allow it and pay it, then it would have been made to enter into Chapman's account, and Chapman would have been charged with it; while, as it was, the company paid Chapman a balance, which

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they could have justly withheld from him, and thus compelled him to account for the money he had obtained from Farris on the company's credit.

The rule of law is, that a party is concluded by admissions or conduct upon which others have been induced to act to their prejudice. (1 Phillips' Ev. 360; 1 Cow. & Hill's Notes, 367; Starkie Ev. Part IV, 31; *Quick v. Staines*, 1 Bos. & Puller, 295; *Weland Canal Co. v. Hathaway*, 8 Wend. 483; *Chapman v. Searle*, 3 Pick. 38; *Wallis v. Truesdell*, 6 Id. 455; *Stephens v. Baird*, 9 Cow. 274; *Hollister v. Johnson*, 4 Wend. 642; *Demyer v. Souger*, 6 Id. 436, 437; *Flower v. Herbert*, 2 Vesey, sen. 325, 326; *Pickard v. Sears*, 6 Adol. & Ellis, 469; *Gregg v. Wells*, 10 Id. 90; *Dezell v. Odell*, 3 Hill, 222.)

If Farris loaned the money to the company, as he now pretends, he intentionally misled them, and that, too, with the view to have them defrauded in their settlement with Chapman. (See 1 Story's Eq., Secs. 191, 192, and Notes.)

The subscription paper contained no stipulation or condition for repayment of the money advanced to said Farris on any condition whatever.

The contract, evidenced by this subscription paper, is clear, unambiguous, and conclusive, and as I have already shown, cannot be added to or altered by parol evidence.

That such subscription was binding as a contract on the subscriber, John R. Farris, see the following authorities: (*Lake Ontario, Auburn and New York R. R. Co. v. Mason*, 16 New York, 451; *The Rensselaer and Wash. Plank Road Co. v. Barton*, Id. 457; *Cross v. Jackson*, 5 Hill, 478; *Stanton v. Wilson*, 2 Id. 153; *Stewart v. Trustees of Hamilton College*, 2 Denio, 417; 1 Wheaton's Selwyn, 32, and cases there cited; *Train v. Gold*, 5 Pick. 384; *Am. Acad. v. Cows*, Id. 427.)

And that it was not made in the books of the company does not alter the case. (7 Barb. 158, 160; 21 Id. 454; 1 Kernan, 102; 14 Wend. 23; 9 John. 217; 21 Wend. 274.)

George Cadwalader, for Respondent.

The stock was subscribed for before any money was paid, and the

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condition attached to the payment of the money was, that if he, Farris, kept his situation, it should apply upon his stock subscription—otherwise it should be returned to him. We are not suing upon the stock subscription, and neither are we sued thereon. Nor did our right of action accrue at the date of the subscription, but at the date of the advances made by us to the defendant.

The stock subscription and its conditional character were proved, merely to illustrate the condition upon which we let our money go into the hands of the defendant; and, in this view of the case, it is wholly unnecessary to inquire into the validity of the subscription, or whether parol evidence is admissible to vary its terms.

The defendant does not rely upon the "subscription" as a defense; to do so he must recognize Farris as a stockholder, and show that the eight hundred and twenty dollars was necessary to liquidate the assessments upon the stock held by him. Neither does Farris rely upon the subscription, or upon a contract of a date even with the stock subscription.

When Farris is sued upon his "subscription," then the question may arise, whether he can show its conditional character by parol evidence, and the cases cited by counsel may possibly be applicable.

The advance of money, from whence springs our right of action, was not contemporaneous with the stock subscription, and was not made to apply thereon except subject to a condition which failed. The money procured from Farris was used in paying off the hands upon the company's steamer *Enterprise*; this fact of itself dispenses with all proof of agency. Dunlap's Paley's Agency, 165, says: "But the fact of articles purchased having come to the use of the master, is *prima facie* sufficient to make him liable." Upon the other points made by appellant, it is sufficient to refer to the evidence.

NORTON, J. delivered the opinion of the Court—COPE, C. J. concurring.

The evidence was sufficient to sustain the finding that the money was advanced as a loan, to be applied as payment on the stock subscription, if Farris was continued in his place as captain of the

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Enterprise ; but if not so continued, then to be repaid. It is hence not necessary to decide whether, if the money was paid on the stock subscription, it could be reclaimed in consequence of the verbal condition upon which the subscription was made.

Although there was no direct authority given to Chapman by resolution of the Board of Directors to borrow the money, nor any direct ratification by resolution of the Board, yet the evidence of the character of Chapman's agency and of the acts which he did, and the knowledge which the officers and directors of the company had of his habit to borrow money for the defendant in the course of his agency, and the fact of the money being applied to the use of the defendant, was sufficient to warrant the finding that the money was borrowed for the defendant by its lawful agent.

The withholding of this item from the account rendered by Chapman by an understanding between him and Farris, indicates a purpose at the time to consider the money advanced either as a payment on the stock subscription or a loan to Chapman, instead of the defendant ; but it does not change the fact that the money was loaned to the defendant, as found by the Court on the evidence, nor was it an act which, especially when considered in connection with the proof as to what transpired between the officers of the company and Farris in regard to this claim, and the reference to it in the affidavit annexed to Chapman's account, can operate as an estoppel against claiming the amount as due from the defendant.

Judgment affirmed.

THE PEOPLE *ex rel.* FLAGLEY v. HUBBARD.

MANDAMUS does not lie to compel an inferior tribunal to act in a particular manner in a matter respecting which it is invested with discretionary power. The action of a Justice's Court in granting or refusing a change of venue cannot be reviewed in an application for a *mandamus*. By this writ the Justice may, in case of his refusal, be compelled to act, but his erroneous action cannot be thus corrected. The remedy is by appeal.

A Justice's Court to which a case has been transferred from another similar Court may again, for cause shown, change the venue.

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APPEAL from the County Court of Solano County.

The facts are stated in the opinion.

Whitman & Wells, for Appellant.

The respondent had no authority to entertain and grant the application of defendant to change the place of trial; or, if he had such authority, the determination of the application in this case was a nullity, because the effect of it is to reverse the decision of Justice Riddell, which had become the law of the case.

It was competent for the parties, at the time the application was made in Justice Riddell's Court, to have contested the question as to the place of trial, and to have brought to the notice of the Court any objection they might have to trying the case in the Court of respondent; having failed to do so, we insist that the original order of Justice Riddell fixed the place of trial, and thus far became the law of the case. Nor, do we conceive, that the provisions of the statute, giving the Justice, to whose Court the action is transferred, full jurisdiction over the case, militates against this view. It simply provides that "The Justice to whom an action may be transferred by the provisions of this Sec. 582, shall have and exercise the same jurisdiction over the action as if it had been originally commenced before him," and gives him jurisdiction to try and determine the case as it comes to him, but not to re-try it as to any questions already passed upon; for in such case he might with propriety re-transfer the case to the Court of the Justice before whom it was originally brought. The rule established by Sec. 582 of the Practice Act is at variance with the general policy of law, in allowing the party to exercise his caprice as to the Court in which his case is to be tried, on a simple affidavit of belief; and we submit that there is no good reason why it should receive any other than a strictly literal construction. In other Courts, a party must show actual facts constituting good reasons for the change.

The question raised here is not open to correction by appeal, as we have only the right of appealing from a judgment, and the cases of *Larue v. Gaskins* (5 Cal. 507) and *Purcell v.*

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McKune (14 Id. 230) are in point as to our right to this remedy. If the action of the respondent in this case be sustained, it results that a cause of this kind may be sent to every Court in the county, *seriatim*, and never be tried. The provisions of the statute are imperative, and leave only to the discretion of the Justice the fixing the place of trial. If his action in this respect has no force or effect, the determination of an action may be indefinitely postponed upon affidavits.

No one marked for Respondent.

CROCKER, J. delivered the opinion of the Court—COPE, C. J. concurring.

On the twentieth day of November, 1862, Flagley commenced an action against A. Guffy and others, before G. H. Riddell, a Justice of the Peace in the County of Solano, and on application of the defendants the action was removed for trial before the defendant, Hubbard, a Justice of the Peace in the same county. At the time set for trial before the defendant, the defendants in the action again moved for a change of the place of trial, on the ground that they could not have a fair trial before the defendant. The Justice sustained the motion, and entered an order changing the trial to another Justice in the same county. The plaintiff, Flagley, then applied to the County Judge of Solano County for a writ of *mandamus*, commanding the defendant to vacate the order of removal entered by him, and to proceed to try the action. The application for the writ was afterwards heard by the County Court of Solano County, and the same was refused, and the petition for the writ dismissed. The relator, Flagley, appeals from this order to this Court, and contends that the County Court erred in refusing the writ of mandate as prayed for.

We think there is no error, and that the County Court properly refused to grant the writ. In this case the defendant, as a judicial officer, determined a question properly brought before him, and his action therein cannot be reviewed by means of a writ of mandate. This Court, in the case of *McDougal v. Bell* (4 Cal. 177), recognized the rule that "Courts of law have uniformly refused to allow the rule for a *mandamus* to issue, when it was to compel a person,

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inferior officer, Court, or corporation, to act in any particular manner, where such person, officer, Court, or corporation was invested with discretionary power.”

In the present case, it was the duty of the defendant to determine the question whether the defendants, in the case before him, had a right to a removal of the cause, and having decided it, his decision is subject to review, upon appeal from the final judgment, like any other order or judgment in the case, and in this form the relator has a full and ample remedy. Had the Justice refused to decide the matter, or make any order upon the motion for removal, and refused to proceed with the case, then he might have been compelled by *mandamus* to act and determine the questions submitted to him.

The judgment is affirmed.

On petition for rehearing CROCKER, J. delivered the following opinion—COPE, C. J. and NORTON, J. concurring.

In the petition for a rehearing in this case, it is urged that the Justice had no discretion under the statute, and that it was his duty to proceed to try the case; but no reason is given for this position. Section 582 of the Practice Act provides that “if either party make affidavit that he has reason to believe, and does believe, that he cannot have a fair and impartial trial before such Justice, by reason of the interest, prejudice, or bias of the Justice, the action shall be transferred to some other Justice of the same or neighboring township.” That affidavit was made in this case before the defendant. It would seem that upon the filing of the affidavit, as required by the statute, it would be the *duty* of the Justice *not* to try the case, but to transfer it. The fact that it had already been changed once can make no difference, as the object of the law is to provide the parties with a disinterested, unprejudiced, and unbiased tribunal to adjudicate their cause. The party was not barred from applying for the second transfer because the first Justice had ordered the case for trial before the defendant. He might not then have known of the interest, prejudice, or bias of the defendant, and therefore may not have raised any objection, or if he had raised it, might not have been able to substantiate

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it. He was not therefore estopped from applying for the second change.

We are referred to the case of *Larue v. Gaskins* (5 Cal. 507), in support of the proposition that a *mandamus* is the proper remedy. In that case the Justice refused to transfer the cause or proceed with the trial, and it was because of this *refusal to act* that the *mandamus* became the proper remedy. But where the officer does act, and either transfers the case or proceeds with the trial, the correctness of such action cannot be reviewed by this writ. The same principle is recognized in the case of *Purcell v. McKune* (14 Cal. 230).

The petition for a rehearing is denied.

BENNETT v. HIS CREDITORS.

THE fact that the schedules of losses and property attached to the petition of an insolvent are defective in not setting forth the items with sufficient particularity, is no ground for dismissing the proceeding for his discharge. These defects affect the sufficiency of the papers as pleadings, but not the question of jurisdiction.

In a proceeding for discharge by an insolvent, the filing of the petition, which stands in the place of a complaint, and due publication of the notice to creditors, which stands in the place of a summons, give the Court jurisdiction over the subject matter and the parties.

If the schedules attached to the petition of an insolvent do not set forth the items with sufficient particularity, the proper remedy is by motion to require the insolvent to state them properly, and not by motion to dismiss.

An objection by the respondent that the transcript does not contain the whole record must, under the rules of this Court, be made before the case is submitted. If made for the first time in a brief after submission it will not be considered.

APPEAL from the Twelfth Judicial District.

The transcript in this case contains the insolvent's petition, in which reference is made to certain schedules attached. The latter, which appear to have been the foundation of the motion to dismiss, do not appear in the transcript, nor does the motion for dismissal, which is set forth with the decision thereon, contain any statement

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of the grounds on which it is made. The case was submitted on briefs without objection by either party that the record was incomplete.

The other facts sufficiently appear in the opinion.

Frank Smith, for Appellant,

Contended that the defects alleged to exist in the schedules were similar to insufficient allegations in a pleading, and subject to objection by way of demurrer and to amendment, but did not affect the jurisdiction of the Court, and cited: (*Brewster v. Ludikins*, 19 Cal. 162; *Moore v. His Creditors*, Id. 691; 2 Pet. 709-712; Id. 623; 2 How. U. S. 338; 3 John. 105.)

M. Compton, for Respondent.

I. The record not purporting to contain all the papers in the case, this Court will not interfere or review the order of the Court below in dismissing the insolvent proceedings. (*Loucks v. Edmonson*, 18 Cal. 203; *Stone v. Stone*, 17 Id. 518.) If the whole record had come up, error upon the record, or the decision of the Court upon it, could then be assigned. (*Hanscom v. Tower*, 17 Cal. 518.) But where there is no record, or a defective record, the Supreme Court will presume the decision of the Court below to be correct, for the appellant must show affirmative error. (*People v. Levinson*, 16 Cal. 98.)

II. The question of jurisdiction is always open, and may be taken advantage of at any stage of the proceedings, either before or after final judgment. (*Elliot v. Piersol*, 1 Pet. 328; *Aldiers v. Henning*, 4 Conn. 382; *Hull v. Williams*, 1 Pick. 232; *Campbell v. Ponrey*, 7 Conn. 64; *Glen v. Smith*, 2 Gill & John. 293.)

III. The Insolvent Courts of this State are Courts of inferior and limited jurisdiction. (*Cohen v. Barrett*, 5 Cal. 95; *Harper v. Freelon*, 6 Id. 76.) A party relying on a right derived under this statute is bound to show the Court had jurisdiction to act in the first instance. (*Sackett v. Andress*, 5 Hill, 327.) The jurisdiction will not be presumed. In Courts of general jurisdiction, the jurisdiction will be presumed; but in Courts of limited and especial jurisdiction, you must show it. This is the universal rule; and a

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party who relies upon the proceedings of such a Court, is bound to establish the jurisdiction affirmatively upon the face of the proceedings, both over the parties and the subject matter; and hence all the requirements of the statute must be strictly pursued; otherwise the proceedings are *ab initio* void, and may be assailed whenever they are brought in question. (*Schnider v. McFarland*, 2 Comst. 459, 461, 464; *Corwin v. Merritt*, 3 Barb. 341, 343, 346; *Bloom v. Burdick*, 1 Hill, 134, 139, 143; *People v. Barnes*, 12 Wend. 494; *People v. Corlies*, 1 Sandf. 247; *Smith v. Rice*, 11 Mass. 507, 510, 512; *Planters' Bank v. Johnson*, 7 S. & M. 449, 454; *Wiley v. White*, 2 Stew. & Porter, 355; *Ventress v. Smith*, 10 Pet. 161.)

These are special proceedings. (*Harper v. Freelon*, 6 Cal. 76.) The provision of the statute is strict, and must be strictly followed. (*Cohen v. Barrett*, 6 Cal. 195.) All the necessary facts which the statute directs must be distinctly set out, in order to confer jurisdiction. (*Sackett v. Andrews*, 5 Hill, 327; *Sallin v. Tobias*, 3 Paige, 338; *Wheeler v. Townsend*, 3 Wend. 247; *Bigelow v. Stearns*, 19 John. 41; *Cole v. Stafford*, 1 Caine, 340; *Sallin v. Thomas*, 1 John. 300.) That the insolvent must give a "list" of losses he may have sustained (not a lumped statement), and a complete and perfect inventory of all his property, real, personal, and mixed, of all choses in action, debts due or to become due, is unquestionable, in order to constitute jurisdiction. (See Wood's Dig. Sec. 3, p. 496.) The rule respecting statutes of this kind is strict, and there is a legal duty resting upon the insolvent to comply strictly with its terms. A failure in this respect goes to the jurisdiction, and may be taken advantage of at any stage of the proceedings, either before or after final verdict or judgment. It is like a defective indictment, or information, not being aided by a verdict, as defective pleadings are in civil cases. But such a defect in a declaration or complaint, would be a ground of error in a civil case, and that too in a Court of general jurisdiction. (*Bacon v. Paige*, 1 Conn. 404.)

As a voluntary bankrupt, it was necessary for the insolvent to present to the Judge such papers in legal form as the statute directs, before the jurisdiction of the Court could attach. (*Sackett v. Andrews*, 5 Hill, 327.)

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The case of *Brewster v. Ludekins*, cited, and relied on by the appellant as an authority in this case, has no application whatever. In that case an attempt was made to impeach the discharge collaterally, in another proceeding; and the Court held that the insolvent proceedings were sufficient to protect them from an attack collaterally, after final decree. But the objection here is taken in the insolvent proceedings themselves. This Court did not go as far in the case of *Brewster v. Ludekins*, nor has it ever yet gone so far as to decide, that an objection going to the jurisdiction of the Court when made as a ground of opposition, is not fatal, and may not be taken advantage of in the very proceeding itself.

CROCKER, J. delivered the opinion of the Court—COPE, C. J. concurring.

This is an appeal from an order dismissing the proceedings in insolvency instituted by the appellant.

The appellant filed his petition in insolvency in the Court below on the fifteenth day of January, 1861, and the usual orders were made for a meeting of the creditors and for a stay of proceedings against the insolvent. Notice was duly published, an assignee was afterwards appointed by the Court, and George C. Johnson appeared and filed an opposition to the discharge upon various grounds. The insolvent filed his answer to this opposition, denying all the charges, and the issues thus presented were duly tried by a jury, who returned a verdict in favor of the insolvent. The opposing creditor then moved to dismiss the proceedings, which motion was granted by the Court below, and the insolvent appeals therefrom to this Court, alleging that the Court erred in dismissing the case.

It appears that the motion to dismiss was made on the ground that the Court had never acquired jurisdiction of the proceedings, and this seems to have been predicated upon the alleged insufficiency of the schedule of losses and of the insolvent's property, attached to the petition, which, it is claimed, do not set forth the items with sufficient particularity.

We think that these objections and defects are not sufficient to authorize the action of the Court in dismissing the case. The objections urged affect the sufficiency of the papers as *pleadings*, but not

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the question of jurisdiction. As pleadings, any defect or omission might be corrected by amendment.

It is true, proceedings in insolvency are founded upon the statute, and the Courts in these cases exercise a special jurisdiction. In such cases the general rule is that the requirements of the statute must be strictly pursued. In order to give the Court jurisdiction of the case the insolvent must file a petition, setting forth substantially such a state of facts as will bring the case within the provisions of the statute, and show that he is entitled to the relief therein provided. The petition, which stands in the place of a complaint, and the notice, which stands in the place of a summons, when duly published, give the Court jurisdiction over the subject matter and the parties. (*Brewster v. Ludekins*, 19 Cal. 162.)

If the petition and schedule are insufficient or defective, they may be objected to and amended, if desired, like other pleadings, and the Court, after having acquired jurisdiction, can take such action respecting them as the rules of law authorize. In the present case, if the schedules do not set forth the items with sufficient particularity, the proper remedy is by motion to require the insolvent to state them properly, and not by motion to dismiss for want of jurisdiction.

The respondent in his brief, filed since the case was submitted, objects that the transcript does not contain the whole record. It is not urged that it is insufficient to show the action of the Court in which the alleged error was committed. This objection, if a valid one, should, under the rules of this Court, have been made before the submission of the case; and then the appellant, if necessary, could have applied for an order requiring any omitted papers to be certified to this Court.

The judgment of the Court below, dismissing the case, is reversed, and the cause is remanded for further proceedings.

BROOKS v. CROSBY *et al.*

A PARTY who appears at the taking of a deposition and examines the witness without objecting to his competency cannot afterwards interpose that objection.

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Where the parties stipulated that a deposition which had been taken in another action should be used on the trial "with the same force and effect, and subject to the same exceptions, as if taken in this case:" *held*, that the stipulation was a waiver of any objection to the competency of the witness.

Where the interest of a witness is disclosed during the examination in chief, an objection to his competency must be taken before the cross-examination. The opposing party cannot take the chances of a cross-examination and then move to strike out.

What latitude shall be allowed to a plaintiff in introducing evidence in rebuttal after defendant has rested, is entirely discretionary with the trial Court, and its action in this respect is not subject to review upon appeal.

Where the charge of the Court, taken as a whole, fairly submitted the case to the jury, the judgment will not be disturbed because that some instructions were refused which could properly have been given, or that some of those given are subject to verbal criticism.

APPEAL from the Twelfth Judicial District.

This is an action of ejectment brought by B. S. Brooks against William Crosby and others, executors of John Clyne, to recover twenty acres of land lying within the limits of the City of San Francisco. Plaintiff derives his title from one Foley, and on the trial sought to recover by showing a prior possession of the premises in Foley. Both Foley and Clyne, the defendants' testator, were living upon the premises in 1853, and the principal question mooted was as to which of the two were in the actual possession at that time. The testimony was voluminous and conflicting, that of plaintiff tending to show that the occupation of Clyne was under Foley, and that of defendants that Clyne had a possession independent and adverse.

On the trial plaintiff offered in evidence the deposition of one Welch, which had been taken in another case. It had been stipulated by the parties in the present action, "that the deposition of A. Welch, taken in the case of *Zenos Coffin v. John Clyne* in this Court, may be used in evidence with the same force and effect, and subject to the same exceptions and objections in all respects as if taken in this case." No objection to the competency of the witness was taken in the deposition. From certain deeds which were in evidence it appeared that Welch had once been the owner of the premises by conveyance from Foley, and that he had only, so far as these deeds showed, parted with a portion of the title, still

remaining the owner of an undivided interest. The deposition showed an examination of Welch upon the question of his interest in the same premises sought to be recovered in this action, in which he stated that he had once owned an interest but had sold it. Defendants objected to the reading of the deposition on the ground of interest in the witness; the objection was overruled and defendants excepted.

The plaintiff called as a witness one Shear, and in the course of his examination in chief a deed was introduced which showed that witness had once owned an undivided interest in the premises. Defendants cross-examined him at length on other matters, and then moved to strike out his evidence on the ground that he was interested, which the Court denied, and defendants excepted. Plaintiff then proposed to question the witness for the purpose of disproving his apparent interest. Defendants objected on the ground that the interest having been shown *aliunde* by a deed, could not be disproved by his own evidence. The Court overruled the objection and defendants excepted, and the witness then stated that he had sold all his interest to one Parsons before the commencement of the action.

The plaintiff, in making out his case, introduced evidence tending to show that Clyne had occupied the premises as tenant of Foley, and proved admissions of Clyne that he had paid Foley rent. The defendants' evidence tended to disprove any tenancy. After defendants rested, plaintiff called in rebuttal one Harkness, and proposed to prove by him that he knew of Clyne having paid rent to Foley. Defendants objected on the ground that the evidence was not proper in rebuttal; that plaintiff having in his chief examination gone into this question should have exhausted his proof upon it. The objection was overruled and exception taken by defendants.

A large number of instructions were asked by the parties, the action of the Court upon many of which is assigned as error; but as they were not separately considered in the opinion they are omitted from this statement. The verdict and judgment were for the plaintiff and defendants appeal.

D. Bizler, for Appellants.

I. The evidence was insufficient to justify the verdict. The defendants claim that according to the testimony neither Foley nor his grantees had any prior actual possession of the premises, but whatever question there may be as to the possession up to 1853 and during that year, there is none as to the possession subsequently. From that time it is not disputed that Clyne was in the actual exclusive possession until his death, November 13th, 1860, and his executor since. This action was not commenced until December 11th, 1860, and the defendants having shown an adverse possession for more than five years previously, under their plea of the Statute of Limitations the plaintiff was barred of recovery.

II. The Court should have excluded the deposition of Welch, on the objection of defendant, that being a joint tenant or tenant in common with plaintiff—as appeared by the deeds put in evidence—a recovery would inure to his benefit, and he was interested. (*Barrett v. French*, 1 Conn. 364, 365; *Rogers v. Mabe*, 4 Dev. 180, 196; *Smith v. Blackman*, 1 Salk. 283.)

Where a *prima facie* case has been made out against the defendant, as tenant in possession, a witness is incompetent to prove himself the real tenant, and that the defendant was only his bailiff. (*Doe v. Wilde*, 5 Taunt. 183), per Mansfield, C. J.: “He comes to rebut a verdict which would have the effect of turning him out immediately, and that is an immediate interest, and outweighs the contrary and remoter effect of his subjecting himself, by his testimony, to an action.” (And see, also, *Doe v. Bingham*, 4 Barn. & Ald. 560, 561.)

Nor is a tenant in possession a competent witness to support his landlord's title, because it is to uphold his own possession. (*Doe v. Williams*, Cowper, 621; *Doe v. Pye*, 1 Esp. 364.)

III. The Court erred in refusing to strike out the testimony of the plaintiff's witness, Wm. Shear, on the ground that he was interested in the premises. (Rec. 44.)

Admitting that where the interest of the witness appears by his own parol testimony, when no writing is produced, he may remove

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that interest by the same testimony, we contend that if such interest appear *aliunde*, independent of his own examination, or when during his examination, a deed or writing is produced showing his interest, that interest must be overcome by evidence independent of his own, or by the introduction of a deed or writing divesting him of the interest. (*The Watchman*, Ware, 235, 236; *Murray v. Marsh*, Phillips' Ev. 101, 102; 2 Hayw. 290; *Mifflin v. Bingham*, Peake's Ev. 186; 1 Dall. 272; *Bridge v. Wellington*, 1 Mass. 219; *Anderson v. Young's Executors*, 21 Penn. State, 447; *Banks v. Clegg*, 14 Id. 391; *Goodhay v. Hendry*, 1 Mood. & Malk.; *Wandless v. Cawthorne*, Id. 321, note 319; Anonymous, Id. same page; and see also *Montessor v. Rice*, 3 Wend. 180; *Evans v. Gray*, 1 Mart. Lou. N. S. 709; *Mott v. Hicks*, 1 Cow. 513, 535, 540.)

The witness was therefore still interested as a tenant in common, and his testimony should have been excluded.

IV. The Court erred in admitting the testimony of Harkness, a witness called by the plaintiff after defendants had rested, of payment by Clyne to Shear of rent, against defendants' objections that the testimony was not rebutting. The plaintiff should not have been permitted, in reply to the defendants' case, to adduce testimony, which he might have adduced in the first instance. (2 Phil. Ev. 4 Am. Ed. 912; *Brown v. Murray*, Ry. & Moody, 254; *Gilpin v. Consequa*, 3 Wash. C. C. 188, 189.)

In the last case the Court say: "In your opening you examined witness on this subject, and as nothing new on that subject has been given in evidence, it would be improper for the plaintiffs again to examine witnesses respecting it."

V. The Court erred in giving improper instructions and in refusing to give proper ones asked by defendants.

B. S. Brooks, Respondent, *in pro. per.*

I. The deposition of Welch was properly admitted. Under the stipulation it was not competent for the defendants' counsel to object to the "deposition being used in evidence." The saving of exceptions and objections only goes to objections to the testimony given, for incompetency or irrelevancy, but does not save a preliminary

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objection to the witness himself. It was so decided in *Stebbins v. Sutter*, (2 Stew. 149.)

Objections to the competency of a witness must be taken at the time the deposition is taken, if known at that time; and if the party proceeds with the cross-examination of the witness (except *de bene esse*) after he knows of his interest he thereby waives the objection. A single step is sufficient. (*Morehouse v. De Passen*, Coop. C. C. 300; 19 Vesey, 433; *Hamond v. Courtald*, 1 Russ. & Myl. 429; *Fellingham v. Sparrow*, 9 Dowl. P. C. 114; 4 Jur. 1036; *Lunnings v. Row*, 10 Ad. & E. 606; 2 Per. & D. 538; 3 Mo. 604; *Sheridan v. Medara*, 2 Stockt. 469; *Drake v. Foster*, 28 Ala. 649; *Crosby v. Floyd*, 2 Baily, 133; *Henry v. Morgan*, 2 Binn. 497; *Hayes v. White Pigeon Beet Sugar Co.*, 1 Doug. 193; *Lewis v. Moore*, 20 Conn. 211; *Choteau v. Thompson*, 3 Ohio, 424; *Hair v. Little*, 28 Ala. 236; *Kimball v. Gearhart*, 12 Cal. 46; 1 Phil. on Ev. 154, and note 5.)

The precise question seems to have been determined in this Court in the case of *Jones v. Love* (9 Cal. 71), where the Court say: "No objection was taken to the testimony of the witness upon his examination or cross-examination on this ground, and no objection appeared on the face of the deposition. The fact of interest there appeared, but no statement that the defendants would object to his testimony on the trial for that cause. It was too late to make the objection upon the trial after defendants had appeared and cross-examined the witness. Such an objection must be taken at the earliest moment."

II. There was no error in refusing to strike out the testimony of the plaintiff's witness, William Shear, on the ground that he was interested in the premises.

If, as counsel say, the interest of the witness appeared by the production of the partition deed, he should have objected then. But his examination was continued; and it was not until the defendant had finished his cross-examination that he moved to strike out the testimony. It was too late. If the objection of his interest was founded upon the partition deed, it should have been made when that deed was introduced. (See authorities cited on first point.)

III. The admission of Harkness to testify in rebuttal was right,

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but whether right or wrong it was a matter of discretion with the lower Court and not reviewable on appeal. (*Cutburb v. Gilbert*, 4 S. & R. 551; *Jackson v. Tallmage*, 4 Conn. 450; *Hutchings v. Childrens*, 4 Stew. & Port. 34; *Myer v. Ludwig*, 1 Penn. 47; *Smith v. Britton*, 4 Humph. 201; *Prather v. Taylor*, 1 B. Mon. 244; *Vicaro v. Commonwealth*, 5 Dana, 504; *Commonwealth v. Richetston*, 5 Met. 412; *Taylor v. Shemwell*, 4 B. Mon. 575; *Ford v. Niles*, 1 Hill, 300; *Phila. R. R. v. Stevison*, 14 Pet. 448; *Burnham v. Howe*, 10 Shep. 489; *Young v. Bennett*, 4 Scam. 43; *Slate v. Silver*, 3 Dev. 382; *Towns v. Riddle*, 2 Ala. 694; *Faut v. Cathcart*, 8 Id. 725; *Borland v. Mayhew*, Id. 104; *Joy v. Phifer*, 13 Id. 821; *Walker v. Walker*, 14 Geo. 240; *Duane v. Treat*, 35 Me. 198; *Pierce v. Wood*, 3 Foster, 519; *Henry v. Lowell*, 16 Barb. 268; *McCoy v. Phillips*, 4 Rich. 463; *Gilbert v. Gilbert*, 22 Ala. 501; *Edgar v. McArn*, Id. 796; *Outlaw v. Hurdle*, 1 Jones' Law, 150; *Morse v. Holland*, 36 Me. 14; *Robinson v. Fitzburg and M. R. R. Co.*, 7 Gray, 92; *Martin v. Maguire*, Id. 777; *Bergen v. White*, 2 Bosw. 92; *Mattier v. Colbert*, 24 Geo. 384; *Mowry v. Starbuck*, 4 Cal. 275; *Priest v. Union Canal Co.*, 6 Id. 171; *Gordon v. Searing*, 8 Id. 50; *Touchard v. Cal. Stage Co.*, 13 Id. 605; *Lisman v. Early*, 15 Id. 199.)

IV. In ordinary cases, notwithstanding a misdirection, if the Court see that justice has been done, and that a new trial ought to produce the same result, a new trial will not be granted. (1 *Graham & W. on New Trials*, 301.) We think it would be going too far in a case where legal and equitable justice appears to be done by the verdict, to grant a new trial for an error which did not probably, although it might possibly, have operated upon the minds of some of the jury. (*Train v. Collins*, 2 Pick. 145.) The Court never grants a new trial when they see clearly the merits have been fully and fairly tried. (*Samson v. Appleyard*, 3 Wilson, 272.) Though the Judge may have made some little slip in his directions to the jury, yet if justice be done by the verdict the Court ought not to interfere and set it aside. (*Eastwick v. Caillaud*, 5 Term, 420; 1 *Graham & W. on New Trials*, 271, 301, 322, 323, 341-344; 3 Id. 817; *Johnson v. Blackman*, 11 Conn. 342; *Woodbeck v. Kel-*

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ler, 6 Cow. 118; *Dale v. Arnold*, 2 Bibb, 605; *Train v. Collins*, 2 Pick. 145; *Brazier v. Clapp*, 5 Mass. 1; *Jones v. Fales*, Id. 101; *Newhall v. Hopkins*, 6 Id. 350; *Rennington v. Congdon*, 2 Pick. 310; *Leigh v. Hodges*, 3 Scam. 15; *King v. Hill*, 2 Tayl. 211; *Gillett v. Swett*, 1 Gilman, 475; *Harris v. Doe*, 4 Black. 269; *Morton v. Lunson*, 1 B. Moore, 45; *Bonlan v. People*, 1 Brev. 109; *Ingraham v. S. C. Ins. Co.*, 3 Id. 522; *Graham v. Bradley*, 5 Humph. 476; *Wylie v. King*, Geo. Dec. part 2, 7; *Princeton and Kingston T. Co. v. Gulick*, 1 Har. 161; *Emanuel v. Cocke*, 6 Dana, 212; *Thomas v. Tanner*, 6 Min. 62; *Howard v. Miner*, 7 Shep. 325; *Trench v. Stanley*, 8 Id. 512; *Freeman v. Rankin*, Id. 446; *Reynolds v. Magness*, 2 Ired. 26; *Jewell v. Lincoln*, 2 Shep. 116; *Price v. Evans*, 4 B. Mon. 386; *Ratcliff v. Huntley*, 5 Ired. 545; *Mansfield v. Wheeler*, 23 Wen. 79; *Potter v. Hopkins*, 25 Id. 417; *Selleck v. Turnp. Co.*, 13 Conn. 453; *Camden T. Co. v. Belknap*, 21 Wen. 354; *Gelin v. Stevens*, 7 N. H. 352; *Branch v. Doane*, 17 Conn. 402; *Randall v. Baramore*, 1 Branch, 409; *Greenup v. Stokes*, 3 Gilman, 202.)

COPE, C. J. delivered the opinion of the Court—NORTON, J. concurring.

This is an action to recover of the defendants the possession of twenty acres of land in the City and County of San Francisco. The complaint alleges that on a certain day the plaintiff was seized and possessed of the land in question, and that the defendants entered and ousted him. The answer denies the allegations of the complaint, and sets up the Statute of Limitations.

On the trial the plaintiff relied upon the prior possession of one Foley, and others, under whom he claims. The case was tried by a jury and the plaintiff obtained a verdict, and we are asked to review the evidence, which is claimed to have been insufficient to justify the action of the jury. On this point it is only necessary to say that the evidence is of such a character as to preclude interference on our part; it is voluminous and conflicting, and we cannot undertake to say that the jury arrived at an erroneous conclusion.

The objection to the deposition of Welch is untenable. The deposition was taken in another case, and there was a stipulation that it should be used on the trial "with the same force and effect, and subject to the same exceptions and objections in all respects as if taken in this case." When the deposition was offered it was objected that the witness was incompetent from interest, but we regard the stipulation as a waiver of this objection. The effect of the stipulation was to place the deposition upon the same footing as if it had been taken in the present case, and it is a settled rule that a party who appears at the taking of a deposition, and examines the witness without objecting to his competency, cannot afterwards interpose the objection. We understand the stipulation as reserving only such "exceptions and objections" as could properly be taken when the deposition should be offered in evidence.

There is nothing in the point that the Court erred in refusing to strike out the testimony of the witness Shear. His interest, if he had any, appeared during his direct examination, and the motion to strike out was not made until the defendants had cross-examined him. Of course, it was made too late, as the defendants could not, knowing the interest of the witness, take their chances of a cross-examination, and subsequently avail themselves of the objection to get rid of the evidence.

The point as to the testimony of Harkness only goes to the exercise of a discretionary power by the Court, and is not a matter for revision on appeal.

The only additional points relate to the action of the Court in giving and refusing instructions. We are of opinion that the case was fairly submitted to the jury, and that the record discloses no error for which the judgment should be reversed. It is possible that instructions were refused which could properly have been given, and that some of those given are subject to verbal criticism. On the whole, however, we think there is no substantial ground of objection, as the question for the jury was a very simple one, and depended entirely upon the weight of evidence.

The judgment is affirmed.

On rehearing COPE, C. J. delivered the following opinion—NORTON, J. concurring :

In Matter of Will of Warfield.

The petition for a rehearing in this case is denied. Welch testified in regard to his interest when his deposition was taken. He stated that he had formerly owned a portion of the property, but had sold it. He so stated both on his direct and cross-examination. The fact that certain deeds were afterwards given in evidence, showing his previous ownership, was not sufficient to exclude the deposition.

The point in regard to the testimony of Shear is not well taken. The petition is denied.

IN THE MATTER OF THE WILL OF WARFIELD.

WHERE the Probate Court acquires jurisdiction to probate a will by the presentation to it of a proper petition for that purpose, and the publication of notice of time of proving the will, and afterwards in such proceeding admits the will to probate, its determination is final, except upon a direct proceeding by appeal or otherwise to reverse it, and cannot be questioned collaterally.

A proceeding by petition to the Probate Court to obtain an order that a former probate of a will therein be adjudged void, on the ground of want of jurisdiction, and that the will be admitted anew to probate, is not a direct proceeding to set aside the former probate, but a collateral proceeding, in which such former probate can only be attacked for want of jurisdiction, and not for irregularity.

The existence and contents of a record or other document to show the regularity of legal proceedings, may, if the original be lost or destroyed, be shown by secondary evidence, the same as of any other lost instrument.

The existence of a petition, for the probate of a will which is not on file may, after the lapse of several years be inferred, from mention thereof in the minutes of the Probate Court and reference thereto in books kept by the Clerk and papers on file, and oral testimony tending to prove, but not positively asserting the fact.

Where it was shown that a petition, since lost or destroyed, was filed in the proper Court, the object of which was to procure the probate of a will—that the testator was dead when the petition was presented, and resided at the time of his death in the county where the alleged probate was had—that the petition was drawn by lawyers whose business it was to prepare such papers—that the Court assumed jurisdiction—took proof of the execution of the will—issued letters testamentary, and ordered and approved a sale of real estate by the executor: *held*, that it should be presumed, after the lapse of eight years, that the petition contained a statement of the necessary jurisdictional facts.

A failure to make the order admitting a will to probate on the day specified in the notice, or to fix, by adjournment of the proceeding, a subsequent day for the order, is a mere irregularity, and does not affect the jurisdiction.

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It is not necessary to the validity of a probate that a formal judgment or decree, that the will is admitted to probate or is proved should be entered; a direct statement that the will is proved, although entered in the minutes as part of and preliminary to an order directing letters to issue, is sufficient.

Courts will uphold where it is possible a contemporaneous interpretation of a statute under which interpretation rights of property have for many years been acquired.

The omission by the Probate Court of San Francisco in its proceedings in probating wills previous to 1855, to attach to the will and file with it for record the certificate mentioned in Sec. 24 of the act concerning estates of deceased persons, is not a fatal defect, invalidating the probates of that period.

APPEAL from the Probate Court of San Francisco.

The facts are stated in the opinion of the Court.

Wm. H. Clark, for Appellant.

I. There was never before the Court any petition whatsoever for the admission of the will of the testator to probate, always excepting the petition of the appellant herein, and the evidence introduced by the intervenor is incompetent and insufficient to establish the existence at any time, or the loss, or destruction, or the contents of such petition.

There has been no foundation laid for the introduction of secondary testimony upon the subject of such petition, by showing the loss or destruction thereof, or in any way accounting for its absence.

Before inferior evidence of the contents of a record can be introduced, the absence of the higher evidence must be clearly accounted for. (*Adams v. Betz*, 1 Watts, 428; 2 Cow. & Hill's Notes to Phil. Ev. note 376, p. 352.)

All the evidence in the case having any supposed bearing upon the existence or contents of such petition, is the testimony of the witness Blood, and the entries made in a book termed the "Clerk's Account Book."

The testimony of Blood is incompetent. He does not know, or state, or pretend to recollect the particular contents of the document which he conceives to have been a petition for probate of the will, but only testifies as to the general character, scope, or object of the paper, and that too in a suppositious way. He is not shown to

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be a lawyer or an expert, or to possess any particular intelligence on such subjects, and cannot therefore in this general way prove either the character or contents of the document assumed to be lost. (*Posten v. Rassette*, 5 Cal. 467.)

Records are of the highest species of evidence, and when duly authenticated as such, commonly import verity, and require no further proof. Greater particularity, therefore, in the proof of lost records and their contents is required than in the case of private writings. And in Phillips on Evidence with Cowen & Hill's notes, many authorities bearing upon this subject are referred to, coupled with the remark: "Such secondary proofs should be received with very great caution. In this all the numerous authorities cited agree." (2 Cowen & Hill's Notes to Phil. Ev. 64, 352.)

A certain entry in a book called "An Account Book," it has been urged by the opposing counsel, constitutes some evidence from which it may be inferred a petition for admission of the will to probate was filed.

It would seem to be an anomaly to call this book a record of the Court, proving itself without further evidence of its authenticity or correctness, and without even a certificate to that effect, and to admit it as evidence that an important paper, the foundation of the jurisdiction of the Court, was filed in the cause; a book which is but a mere rough memorandum kept by the Clerks, mainly for the purpose of guiding them in the collection of their fees. And, it is going still further, to say that such a book shall be evidence of the character and contents of the paper filed. As a private memorandum, it is, of course, inadmissible, being unsupported by an oath.

II. The Probate Courts of this State are Courts of inferior jurisdiction. (*Smith v. Andrews*, 6 Cal. 652; *Beckett v. Selover*, 7 Id. 215; *Haynes v. Meeks*, 10 Id. 110; *Clark v. Perry*, 5 Id. 60; *Head v. Sanford*, 5 Id. 268; *Townsend v. Gordon*, 19 Id. 188.)

The Act of 1858, changing the rules of construction of the proceedings of these Courts, has no application to proceedings taken before its passage. (Statutes of 1858, 95; *per curiam* in *Townsend v. Gordon*, supra.)

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The jurisdiction of such Courts will not be presumed, it must be affirmatively shown both in pleadings and proofs by any party relying upon the validity of any proceeding instituted therein. (*Townsend v. Gordon*, 19 Cal. 206; *Gregory v. McPherson*, 13 Id. 562; *Gregory v. Taber*, 19 Id. 397; *Bloom v. Burdick*, 1 Hill, 134; *Corwin v. Merritt*, 3 Barb. S. C. 341; *Schneider v. McFarland*, 2 Comst. 459; *People v. Corlies*, 1 Sandf. S. C. 247; *Mills v. Martin*, 19 John. 33; *Latham v. Edgerton*, 9 Cowen, 227; *Ford v. Walworth*, 15 Wend. 449; *Ford v. Babcock*, 1 Denio, 150; *Smith v. Rice*, 11 Mass. 507; *Bridge v. Ford*, 4 Id. 641; *Planters' Bank v. Johnson*, 7 S. & M. 449; *Wiley v. Wade*, 2 Stew. & Porter, 354; *Ventress v. Smith*, 10 Pet. 161; *Peacock v. Bell*, 1 Saunders, 73.)

III. There is not only no petition, but no order of the Court appointing any time for proving the will and for parties to show cause why the will should not be admitted to probate, nor is there any order of notice. There is no order of the Court whatever relating directly or indirectly to these matters, though expressly required by statute. (Probate Act, Sec. 13.)

IV. The first and only proceedings in Court having any reference to the probating of the will, were on the thirty-first of May, 1853, at which time the depositions of Lothrop, Burritt, and Blood were taken and filed, but no notice was given for that day; nor then, nor at any other time, were subpoenas or citations issued or made returnable, nor were any absent interested persons or infant heirs represented, contrary to the express provisions of the statute. (Probate Act, Secs. 16-18.)

It was strictly an *ex parte* affair. No proceedings of a Star Chamber Court could apparently have been sprung more suddenly or conducted with greater privacy. Indeed, up to the time of taking action on the petition of the appellant in the present year, no guardian was ever appointed to appear for the infant heirs of the deceased. Their existence seems to have been ignored, except that they are named as devisees in the will, and are mentioned with the particulars of their names, ages, and residence in the petition of Blood, as Executor, for license to sell the real estate. Not even then, however, was any person appointed to represent them.

V. There was no order or action of the Court at any time admitting the will to probate. The order of thirty-first May, 1853, for letters testamentary to issue to Blood, sets forth by way of recital only, that I. M. Blood has by the testimony of certain witnesses proved the execution of the will. This evidently is the order which the Clerk in his account book or register, under date of May 31st, terms "order for probate of will." It is incompetent to establish the action of the Court in a proceeding of this character by mere recital in an order relating to a different subject matter. (*Sibley v. Waffle*, 2 E. D. Smith, 180.)

A recital in a Surrogate's order of sale, that an account of the personal estate and the debts was presented, is insufficient to establish that fact and give the Court jurisdiction. It must be affirmatively shown. (*Ford v. Walsworth*, 15 Wend. 449.)

The findings and certificate of proof under the seal of the Court, signed by the Judge, and recorded as required by statute, are in such a proceeding equivalent to a decree or judgment, and are herein wholly wanting.

When a decree is required by statute, an order setting forth the facts which would justify the decree is insufficient. The decree cannot be presumed from the order. (*People v. Barnes*, 12 Wend. 494.)

However, the order in itself, aside from the foregoing objections, is of but little moment. It merely purports to show a recognition by the Court that the execution of the will was proved. There are many other elements which go to constitute or authorize the admission of a will to probate, viz.: the important jurisdictional facts of the death and last residence of the testator, also his sanity, freedom from undue influence, and the condition of the estate.

Such action of the Court as is incidentally expressed in the above order cannot be construed as an admission of the will to probate.

VI. Assuming that the first point (viz.: that for want of a petition the Probate Court had no jurisdiction over the proceeding) is not well taken, the opposing counsel contends that the Probate Court having once acquired jurisdiction, the subsequent irregularities are cured under the maxim of *omnia rite acta presumuntur esse*.

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It seems to me that it would be a most remarkable stretch of this principle, such as no other Court ever indulged in before, to cover the numerous and vital deficiencies which exist in these proceedings with the mantle of this old law maxim.

But in addition to what has been urged in the consideration of each defect or irregularity by itself, I would say generally that regularity of proceedings cannot be presumed in this instance.

1. Because Probate Courts are Courts of inferior and special jurisdiction, in the exercise of which they are hedged in and circumscribed by statutory enactments, by which they are governed and to which it must be affirmatively shown that they have conformed, and in this rule the numerous authorities hereinbefore cited concur. This rule is founded upon the highest considerations of public policy and necessity, and is intended for the protection of those who most need protection.

2. Because there is in this matter no judgment or decree, or its equivalent, viz. : the certificate of proofs and findings of the Court on which to base the presumption of the regularity of prior proceedings. It is a matter seemingly without either legitimate beginning or end.

3. Because this is a direct and not a collateral impeachment of the regularity of the different proceedings, and all the authorities above cited are unanimous in the case of a direct attack and apply *a fortiori*.

4. Because these proceedings being on the face of them *ex parte* and without notice, are peculiarly liable to suspicion of fraud, or, at least, an invasion of the rights of absent parties, and in such case the maxim of *omnia presumuntur*, etc., would never be applied.

There exist no special reasons in this case for allowing latitude in the doctrine of presumptions. It is not in evidence, nor is it pretended that the papers of the Probate Court have ever been destroyed by fire or otherwise, or have been lost or purloined. On the contrary, the Clerk's register or account book, if the same be admitted in evidence, shows that every order has been entered or filed under its date, that no proceedings have been had, other than those which appear in evidence, that nothing is missing except one single paper, viz. : the petition for letters of special administration.

VII. There is no certificate of proof and findings signed by the Probate Judge and attested by the seal of the Court, and attached to the will as required by statute (Probate Act, Sec. 24), nor is there any certificate whatever among the papers of the case. Neither is there any record of the will with the certificate of proof, etc., as required by statute. (Probate Act, Sec. 25.)

The want of these requisites is fatal. The statute must be complied with. Unquestionably the act not only requires this evidence of the admission of a will to probate, but excludes all other. So it has been distinctly held by this Court. (*Castro v. Richardson*, 18 Cal. 478; *Adams v. Lansing*, 17 Id. 635—the numerous authorities cited by Patterson & Stowe for appellants; *Rodgers v. Jackson*, 19 Wend. 388.)

The only adverse authority cited by the opposing counsel, in the argument before the Court, was the case of *Dennison v. Ingraham*, in Dallam's Digest of Laws of Texas, to the effect that the granting of letters testamentary was sufficient proof of the probate of a will. This cannot be law. If it is, some better authority can be found than a Texan decision of so early a date as to be anterior to the era of regular reports in that State, and perhaps to the organization there of any permanent or enlightened social system. Besides, by reference to the same digest of Texan laws, it will be found that there was in that State no such Probate Act as that of California.

The infant heirs represented by the appellant have a peculiar right to demand a probate of the will sufficient to admit it in evidence in any Court under the rule laid down in *Castro v. Richardson*, *supra*, so that they may be enabled to assert their rights to the land in an action of ejectment, and by introducing the record of the will with the proper certificate of probate and the proofs annexed, to deraign title under it.

John W. Dwinelle and H. P. Hepburn, for Respondents.

I. The proceedings of the Probate Court, as proved in the Court below, on this application, show that the will of Preston Warfield was duly admitted to probate in the year 1853.

II. It having been shown that the first petition made to the

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Probate Court and certain other papers had been lost, it was competent to prove their contents by parol testimony. And it being proved that those papers were drawn by expert and competent persons, it will be presumed that they contained all that was necessary to effectuate their purpose.

These propositions are stated together, because many of the authorities cited below sustain them both. The following cases sustain the proposition that the contents of lost records may be proved by parol: (*Donaldson v. Winter*, 1 Mill. Lou. 137; *Jackson v. Cullum*, 2 Blackf. 228; *Newcomb v. Drummond*, 4 Leigh. 57, 60; *Adams v. Betz*, 1 Watt's, 427, 428; *Ames v. Hoy*, 12 Cal. 11; *Collier v. Corbett*, 15 Id. 183; *Posten v. Rassette*, 5 Id. 457, 469; *Jackson v. Crawford*, 12 Wend. 533.)

III. The book kept by the Clerk of the Probate Court, and called "Account Book," was properly introduced in evidence to prove the loss of the petition, and to evidence other proceedings.

This is the book required to be kept by the laws of 1850, page 261, Sec. 8, which provide that "he shall keep in each of said Courts [of which he is Clerk] a docket, in which shall be entered the title of each cause, with the date of its commencement, a memorandum of every subsequent proceeding in said cause, with the date thereof, and a list of all the fees charged in the cause." The purpose of keeping such a book must be presumed to be that of furnishing testimony, and the grade of that testimony would depend upon the fact to be established. It would probably constitute primary evidence of the payment of fees; and, certainly, is good secondary evidence to prove the filing of a petition which has been lost. (*Hazard v. Martin*, 2 Vt. at foot of the page.)

Even though this book had not been required by an express statute to be kept, it seems that being a register of official acts done by the officer, kept by his direction, and handed over by each officer to his successor as belonging to the office, it would on that ground alone be admissible in evidence. (*Kyburg v. Perkins*, 6 Cal. 674; 1 Green. Ev. Sec. 496.)

IV. Jurisdiction having been shown to have been acquired by the Probate Court over a particular case, it is then to be presumed that the Court acted thereafter regularly within its jurisdiction. (1 Saund. 92, N. 2; *Mills v. Martin*, 19 Johns. 33-35.)

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This is a rule of evidence as well as of pleading; because, although the presumption, *omnia rite acta præsumuntur esse*, does not apply to the facts which give jurisdiction to an inferior Court, (*Rex v. All Saints*, 1 Mann. & Ryl. 668), yet when jurisdiction is once shown to have attached to an inferior tribunal, it will be presumed that it acted regularly within its jurisdiction. (Broom's Legal Maxims, Tit. Omnia rite, etc., *428, 431, and cases cited; 1 McKinley & Lescure's Law Library; *Moravia v. Sloper*, Willes, 39; *Sollers v. Lawrence*, Id. 199; *Thompson v. Tolmie*, 2 Pet. 157, 163; *Jackson v. Robinson*, 4 Wend. 436; 12 Id. 553; *Voorhies v. Bank of United States*, 10 Pet. 449, 474; *In the matter of Prime*, 1 Barb. S. C. 340; *Schuykill Falls Road*, 2 Bin. 250; *Buell v. Trustees of Lockport*, 8 N. Y. 58, and cases there cited; 11 Barb. 602; *Mills v. Martin*, 19 Johns. 85.)

The case of *Sibley v. Waffle* (2 N. Y. 180), does not conflict with the proposition established by the above authorities, for that was a case in which it was proved affirmatively that an order or publication which was actually made had not been complied with.

And whether the Probate Court, after having acquired jurisdiction, acted regularly or not, its proceedings cannot be attacked collaterally; that is to say, until they are reversed directly, upon error or appeal, they are valid and conclusive as to everybody.

This is what the cases mean when they say that such proceedings shall not be questioned collaterally or indirectly. (*Stearns v. Aguirre*, 7 Cal. 448; *Irwin v. Scriber*, 18 Id. 499; *Cloud v. El Dorado*, 12 Id. 133; *Reynolds v. Harris*, 14 Id. 678; *Voorhies v. Bank of the United States*, 10 Pet. 449; *Bush v. Sheldon*, 1 Day, 170; *McPherson v. Canliff*, 11 Serg. & Rawle, 422, 429; *Groff v. Groff*, 14 Id. 181, 184; *McCombs v. Dunbar*, 1 Mill. Lou. 18, 21; *Jackson v. Craufords*, 12 Wend. 533; *Perkins v. Warfield*, 11 Mass. 227; *Brown v. Lanman*, 1 Conn. 467; *Rile v. Questi*, 1 Mill. Lou. 249; *Mills v. Martin*, 19 Johns. 34, 35; *Wise v. Witters*, 3 Cranch, 331; *Jones v. Reed*, 1 Johns. Cas. 20.)

V. Secs. 24, 25, and 26 of the Probate Act, providing for a certificate of the proof of a will by the Probate Judge, do not require a compliance with their provisions in order to make the probate effectual, but were enacted for the sole purpose of simplifying the proofs when needed in other Courts.

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The object of these three sections is to make the exemplification of a probate once had and recorded in a particular manner a substitute for the production of the original will, and a trial of the question of its validity in every case in which those facts become material. These sections are merely directory. A compliance with them is nowhere required as a condition precedent to the issue of letters testamentary. On the contrary, such letters are by Sec. 41 of the Probate Act ordered to issue so soon as "the will is proved and allowed," while Secs. 50 and 51, prescribing the form of letters testamentary, cause them to recite as follows: "The last will of A. B., deceased, a copy of which is hereto annexed, having been proved and recorded in the Probate Court," etc. The utmost that can be inferred from these provisions is that the will must be "proved and allowed" and "recorded," before letters testamentary can issue upon it. There is no condition precedent of making a certificate of proof, nor does any such certificate accompany the will attached to the letters testamentary. For that purpose the letters themselves constitute a sufficient certificate.

In the case at bar the adjudication in the minutes, that the petitioner "comes and proves the execution of the will of deceased now of record," although inartificially expressed, yet logically includes everything necessary to the validity of the will, and is a judgment of the Court to the effect that the will is "proved and allowed," so as to authorize the further order which follows "that letters testamentary issue" in compliance with the same section. (Laws 1851, 452, Sec. 41.)

In *Jackson v. Young* (5 Cow. 269) it was held that a failure by the Sheriff to file a certificate of the sale of lands made by him under execution did not vitiate the title of the purchaser, although the statute required him to file such a certificate in the Clerk's office. A statute of New York requires a newly elected Sheriff, within twenty days after he receives notice of his election and before he enters upon the duties of his office, to execute a sufficient bond with sureties, etc.; but in *The People v. Holley* (12 Wend. 481) these provisions were held to be merely directory.

It appears from the transcript that from the organization of the Probate Court of San Francisco County, in 1850 up to 1855, no

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certificate of probate was ever made, attached to any will, or recorded. This fact was introduced into the record as evidence of the construction put upon the Probate Act by usage, and by cotemporaneous exposition. "Great regard," says Lord Coke, "ought, in construing a statute, to be paid to the construction which the sages of the law who lived about the time, or soon after it was made, put upon it, because they were best able to judge of the intention of the makers at the time when the law was made." (2 Inst. 11, 136, 181.) Hence the maxim: *contemporanea expositio est optima et fortissima in lege*. (Broom's Legal Maxims, *300.) The following cases attribute the highest character to a cotemporary interpretation of this kind: *Stuart v. Laird* (1 Cranch, 299); *Panaud v. Jones* (1 Cal. 499), and cases there cited; *Rogers v. Goodwin* (2 Mass. 477, 478); *Bank of Utica v. Merseran* (3 Barb. Ch. 528, 576); *Leggett v. Rogers* (9 Barb. S. C. 414); *Hazard v. Martin* (2 Ver. 84), at the foot of the page, is precisely in point.

VI. After a long lapse of time, or under other circumstances which raise a presumption of the loss of papers or the failure of testimony, the jurisdiction of an inferior Court may be presumed "*a posteriori*" from its final decrees.

It seems reasonable that the same presumptions which are resorted to in order to sustain acts *in pais*, should be available to sustain the proceedings of Courts. Thus, presumption of title is resorted to in order to sustain a party who has had long continued possession of lands. (*Beall's Lessee v. Lynn*, 6 Harr. & Johns. 361.) And under the same circumstances, on an attempt to connect a possession with title, a defective and void deed was given in evidence and rejected, and yet a good deed was presumed. (*Gitting's Lessee v. Hall*, 1 Id. 14, 18.) So the fulfillment of a condition precedent to the execution of a power of attorney has been presumed (*McConnell v. Bowdry's heirs*, 4 Monroe, 395); a power of attorney preceding the execution of a deed by one assuming to act as attorney (*Buhols v. Boudousquie*, 6 Mart. La. [N. S.] 153; *Clinton v. Campbell*, 10 Johns. 475; *Wickham v. Belknap*, 12 Id. 96); that the requisite oath was taken, and notices of sale posted by an administrator selling lands (*Gray v. Gardner*,

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3 Mass. 399); that an executor's sale was regular after a long acquiescence (*Knox v. Jenks*, 7 Id. 488); that tax bills, valuations, warrants, etc., were regular in order to sustain tax sales (*Coleman v. Anderson*, 10 Id. 105; *Pejebscut Proprietors v. Ransom*, 14 Id. 145, 146); that notices of the sale of lands under a power in a mortgage were regularly posted (*Bergen v. Bennett*, 1 Caines' Cases, 1, 18); a previous lease to support a release (*Minister, etc., of Schenectady v. Veeder*, 4 Wend. 494); a release after a lease and long possession (*Springstead v. Schemerhorn*, 12 Johns. 357, 362); an oath of capacity to hold lands taken by an alien (*Blight's Lessee v. Rochester*, 7 Wheat. 546); the posting of affidavits and regularity of a corporation meeting (*Society for Propagating the Gospel v. Young*, 2 N. H. 310, 313); an abandonment of real estate after a tax sale (*Pejebscut Proprietors v. Ransom*, 17 Serg. & Rawle, 350); the due execution of a will forty years old, although one of the witnesses was living and within the jurisdiction of the Court (*Jackson v. Christman*, 4 Wend. 478); and finally, an order directing the sale of lands by an administrator (*Hazard v. Martin*, 2 Ver. 77, 85).

NORTON, J. delivered the opinion of the Court—COPE, J. concurring.

The minor children of Preston Warfield, by their guardian, presented to the Probate Court a petition setting forth the death of said Warfield, and that his last will was on file in said Court; that as appears by the files and records of the Court, certain proceedings were once instituted therein as if toward and preliminary to the probate of said will, and that on the thirty-first day of May, 1853, the testimony of a subscribing witness touching the execution of the will, and of other witnesses touching the residence, decease, and estate, were reduced to writing, subscribed and sworn to, and that on the same day it was ordered by the Court that letters testamentary on the said estate issue to the executor named in said will, which letters were subsequently revoked on account of the negligence and misfeasance of said executor. The petition then sets forth various irregularities and defects in said proceedings, the most important of which are the allegations that no petition for the pro-

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bate of the will was presented to the Court, and no order made admitting the will to probate, or any certificate of proof made or attached to the will. The petition then prays that said proceedings may be adjudged to be null and void, and that the will be produced by the Clerk and be admitted to probate.

Lewis E. Morgan presented a petition to the Probate Court asking leave to intervene in this proceeding for his interest, alleging that under an executor's sale heretofore made he became the purchaser of certain real estate, which sale was confirmed by the Court on the twenty-fourth day of September, 1853, pursuant to which sale he received a deed and entered into possession of the land, and is now in possession of the same. He was allowed to intervene.

After hearing the proofs of the parties the Probate Court made an order denying the prayer of the petition of said minor children. From this order said petitioners have appealed.

Whether the decision of the Probate Court was correct or erroneous depends upon the fact whether or not the will of the deceased had been previously probated.

If the Probate Court in the proceedings formerly had in relation to this will acquired jurisdiction of a proceeding to probate the will by the presentation to it of a proper petition for that purpose, and the publication of notice of the time of proving the will, and did afterwards in such proceeding admit the will to probate, that determination was final except upon a direct proceeding by appeal or otherwise to reverse it, and cannot be questioned in any collateral proceeding. (*Elliott v. Piersot*, 1 Pet. 328; *Thompson v. Tolmie*, 2 Id. 157; *Voorhies v. Bank U. S.*, 10 Id. 449; *Jackson v. Cronfords*, 12 Wend. 533.)

Although the petition in this case contains a prayer that the former proceedings may be adjudged void, this is not a direct proceeding to set aside a probate of the will. The object of the present proceeding is to have the will admitted to probate upon the assumption that it has never been probated, and not to set aside a probate of the will for defects or irregularities in the proceedings. Whether the will has been heretofore probated is a question collateral to the petitioners' right to have it now probated in the present

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proceeding the same as it would be if the heir should have brought an action of ejectment against the person holding under the executor's sale of the real estate. The plaintiff in such an action could not render it a direct proceeding to revoke the probate by alleging that the proceedings to probate the will, under which the defendant claimed to hold, were irregular and void.

The first question, then, to be considered, is whether a sufficient petition for the probate of the will was presented to the Court in the former proceedings. Such a petition is not now among the papers on file in the Probate Court. If it was presented it has been lost or destroyed or abstracted. For the proof of such a petition having been presented the intervenor has resorted to secondary evidence. The existence and contents of a record or other document to show the regularity of legal proceedings may, if the original be lost or destroyed, be shown by secondary evidence the same as in regard to any other lost instrument. (*Jackson v. Cullum*, 2 Blackf. 228; *Newcomb v. Drummond*, 4 Leigh. 57; *Jackson v. Crawford*, 12 Wend. 533; *Ames v. Hoy*, 12 Cal. 11.) The secondary proof offered consists principally of an order entered in the minutes of the Probate Court under date of April 15th, 1853, of certain entries of the same date in an "account book" kept by the Clerk of said Court, an affidavit of the publication of a notice or order, with a copy of the order annexed, and the testimony of the executor named in the will. The order referred to is in the following words:

"In the matter of the last will and testament of Preston Warfield, deceased.—Order for issuance of letters of special administration.

"On filing the will of deceased, and on petition of Ivory M. Blood, it is ordered by the Court that letters of special administration do issue to said Blood, on filing a bond in the sum of \$1,500; and it is further ordered that notice be given to all persons interested to come forward at the Court room on Saturday, thirtieth April, 1855, at 10, A. M., and show cause, if any they have, why letters of general administration should not issue to the said executor."

The entry in the account book is, with other items, as follows:

"Preston Warfield, 276. Ivory M. Blood, Executor.

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"1853—April 15—Will and petition filed for special administration. Filing and Certificate, 3; Order, 1; Filing, etc., 1 50; \$5 50.

"Dft. no. for pub., 3."

The copy of notice or order annexed to the affidavit of publication was as follows:

"State of California, County of San Francisco, Probate Court.—Notice is hereby given to all persons interested in the estate of Preston Warfield, late of the City of San Francisco, deceased, to show cause, if any they have, on Saturday, the twenty-ninth day of April instant, at ten o'clock, A. M., at the Court room of the Probate Court, in the City Hall, in the City of San Francisco, why the last will and testament of said Warfield should not be admitted to probate, and letters testamentary issued to Ivory M. Blood, who is named in the said will as the executor thereof. Witness, Honorable Alexander Campbell, Probate Judge, this sixteenth day of April, A. D. 1853.

"Attest:

JAMES E. WAINWRIGHT, Clerk.

"O. BAILEY, Deputy Clerk.

Indorsed "Filed May 31, 1853."

The witness Blood testifies that he took the will to the Probate Court and deposited it with the Clerk, and then adds: "I think there was a petition for probate of the will. Messrs. Burritt & Gorham drew one up and I swore to it before the Clerk. I got Messrs. Burritt & Gorham, attorneys, to conduct proceedings to have the will probated. I came here into Court and swore to this petition. I think it was left here, but cannot tell what else it contained, but the object was to have the will probated." Upon cross-examination, he said: "Why I think the petition I have mentioned was for probate of the will is because I was at considerable trouble to ascertain the names, ages and residence of the widow and heirs which Burritt & Gorham said it was necessary to state in the petition. I do not remember about more than one petition." The will itself is found in the Probate Clerk's office, indorsed "Filed April 15th, 1853."

No evidence is given by either party that there is any petition on file in the Probate Court Clerk's office, which could be the one

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referred to in the above mentioned order and entry in the account book.

These proofs are sufficient to show that a petition relating to the estate of the deceased was presented to the Probate Court on the fifteenth day of April, 1853, and we think they also show that the petition was for a probate of the will as well as for letters of special administration. The executor, Blood, testifies that he employed a firm of lawyers "to conduct proceedings to have the will probated." They required him to furnish certain information as to the names, ages, and residence of the heirs which was appropriate to be inserted in a petition for that purpose, but immaterial in one for letters of special administration. They prepared a petition, which he swore to before the Clerk of the Probate Court. The will was filed in the Probate Court on the same day with this petition. The law (Stat. 1851, 449, Secs. 5, 6) requires the executor to present the will to the Probate Court, and *requires* that if he intends to accept he shall present *with* the will a petition praying that the will be admitted to probate and that letters testamentary be issued to him. On the same day an order is entered, setting forth that on filing the will of deceased, and on petition of Ivory M. Blood (who was the executor named in the will) two things are ordered: first, that special letters issue; and, secondly, that notice be given to show cause why letters of general administration should not issue to the said executor. The filing of the will and the petition of the executor are stated as the grounds for making each of these orders. In effect the order states that the petition prayed that notice be given to show cause why general letters of administration should not be issued to the executor. But, as we have seen, the petition for general letters is required to be presented in connection with the petition for probate of the will. Such letters to the executor only issue upon, and as a consequence of the probate of the will. (Stat. 1851, 452, Sec. 41.) Notice of probating the will is required to be given (Sec. 13), but no notice is required specifically of application for letters. They issue, as above stated, as the consequence of the probate of the will. A notice of probating the will involves a notice that letters will issue upon the probate to the executor. We are not now considering

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what is the exact legal effect or meaning of this order, but what it indicates was the prayer of the petition. That the clerk who entered this order was more likely to have employed a brief expression, which he deemed the equivalent of the prayer of the petition, rather than that the lawyers who drew the petition should have omitted the prayer for the principal thing required by the law, and only inserted the prayer for the incident, is indicated by the circumstance that the clerk, in the title of this order, denominates it only as an order for the issuance of special letters of administration, when the order itself shows that it was also for the more important purpose of obtaining general letters. This circumstance is also applicable as explanatory of the brief entry in the account book: "Will and petition filed for special administration." Sufficient only was stated to identify the order, rather than to show its whole contents. In connection with this entry, and of the same date, is the entry: "Dft. no. for pub." But no notice was necessary on an application for special letters only. (Secs. 88, 89.) There is then found in the Clerk's office of the Probate Court, an affidavit of publication of a notice filed on the thirty-first day of May, 1858. The notice is dated the next day after the filing of the petition and the entering of said order for publication; and the notice requires cause to be shown at the same time and place specified in that order; and the cause to be shown is, "why the last will and testament of said Warfield should not be admitted to probate, and letters testamentary issue to Ivory M. Blood, who is named in the said will as the executor thereof." This is evidently a copy of the notice specified in the order and referred to in the abbreviated entry in the account book, and being found filed in proceedings in the case may be properly considered as secondary evidence in determining the character of the petition which was filed. It was a notice of the probate of the will issued upon the filing of the will and a petition of the executor in the Probate Court. Considering what the law required an executor to do upon presenting a will to the Probate Court, that the executor employed lawyers (who should be presumed to know the law) to conduct proceedings to have the will probated, and the foregoing evidence of what was done, we think it was proved that the petition filed on

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the fifteenth day of April, 1853, was for probate of the will and for general letters of administration, as well as for letters of special administration.

It was proved that of the lawyers who drew the petition, and who are the only persons who would be likely to remember accurately its contents, one is dead and the other out of the State. Under these circumstances, when it is considered that it was proved that it was the object of the petition to procure the probate of the will, that the testator was dead when the petition was presented, and that he resided in the County of San Francisco at the time of his death, and that the petition was drawn by lawyers whose business it was to prepare such papers and to know what they should contain, and that the petition was presented to the Court which was authorized to take jurisdiction of the matter in case the existing facts were stated, and that the Court did take such jurisdiction and take proof of the execution of the will and issue letters testamentary, and order and approve the sale of real estate by the executor, we think it should be presumed, after the lapse of eight years, in behalf of the regularity of the proceedings and on the facts proved, that the petition contained a statement of the necessary jurisdictional facts. (*Posten v. Rasette*, 5 Cal. 467; *Collier v. Corbett*, 15 Id. 183.)

Upon the filing of the petition the order above mentioned was entered, that notice be given to all persons interested to show cause why letters of general administration should not issue. The notice published was to show cause why the will should not be admitted to probate. To have been strictly in form the order should have fixed a time for the probate, and directed notice of that time to be published, and the notice published should have been of the time fixed for probating the will. But the order and notice, in the form in which they appear, were substantially equivalent to the order and notice prescribed by the statute. A notice was given, in effect, to all parties interested, of the time and place of probating the will. It does not appear that the will was probated on the day specified in the notice, nor that the probating was adjourned from that day to the day when it was in fact done. But this was, at most, an irregularity, occurring after jurisdiction had been acquired, and

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could only be objected to on a direct proceeding to set aside the probate.

It might, perhaps, be claimed that the presentation of the will to the Probate Court, with a proper petition for the probate, was sufficient to give jurisdiction, and that thus all informalities and irregularities in fixing the time of probate, and in giving notice thereof, would fall within the class of subsequent errors which might render the proceedings voidable, but not void. This point, however, we do not find it necessary to decide.

Having concluded that the Probate Court acquired jurisdiction of the proceedings by the presentation to it of a proper petition for the probate of the will, and by publication of notice of the time fixed therefor, the next inquiry is, whether the will was in fact probated. It is objected that there is no judgment or decree, or its equivalent, of the probate. There is no provision in the statute which requires or contemplates that a formal judgment or decree that the will is admitted to probate, or is proved, should be entered. But Sec. 24 requires that if the Court be satisfied upon the proof taken that the will was duly executed, a certificate of the proof, signed by the Probate Judge and attested by the seal of the Court, shall be attached to the will; and by Sec. 25, the will and certificate of proof, together with the testimony which has been taken, are required to be filed and recorded. The certificate required by Sec. 24 was not made. Was it indispensable to render the proceedings a probate of the will? The actual probating of the will consists in taking the testimony of the witnesses to its due execution, and by Secs. 23 and 25, that testimony is required to be reduced to writing and signed by the witnesses, and filed and recorded with the will and certificate. The expression "a certificate of the proof," as used in Sec. 24, is ambiguous. It is not necessarily a certificate that the will was duly proved, but might be considered only a certificate of what proofs were taken. Still it is not to be made, unless the Court is satisfied that the will was duly executed and its absence unexplained, and especially, if no subsequent proceedings were taken in the case, as upon a probated will, might properly be considered as showing that, in the judgment of the Probate Court, the testimony did not prove the due execution

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of the will. The testimony taken, and which was reduced to writing, and signed by the witnesses, and filed in the Probate Court Clerk's office, was the proper proof, and sufficient to prove the due execution of the will. On the same day it was taken an order was entered that letters testamentary issue, which order begins with this statement: "And now on this day Ivory M. Blood comes into Court, and on the testimony of L. L. Barrett and J. J. Lathrop, proves the execution of the will of deceased as now of record." This is a judgment entered in the minutes of the Court that the will is proved. Although not a formal and separate judgment of this one fact, but stated preliminarily to the order that letters issue, yet it is not in the form of a mere recital of what had been done, but is a direct statement that the executor now proves the execution of the will. On the same day letters testamentary were issued under the seal of the Court, by which, after reciting in the usual form of a recital that the "will having been proved and recorded in the Probate Court," etc., Ivory M. Blood is appointed executor. These facts abundantly show the understanding of the Court that the will was probated. It also appeared from an examination of the "Book of Wills" kept in the Probate Court that from the organization of the Court in 1850 to February 19th, 1855, seventy-eight wills were therein recorded, to none of which was any certificate of proof attached, and that no such certificate was found attached to any will before the date of May 21st, 1855. This is clear proof that it was the understanding of the Judges of the Probate Court at the time the proof of the execution of this will was taken, that such a certificate was not essential to a probate of a will. In the case of *Hazard v. Martin* (2 Vt. 77), in deciding as to the validity of a sale of real estate by an administration which was not ordered by the Surrogate Court, the Judge says: "The statute is so vague in its requisitions, were I sure there was a general understanding in the Probate Courts at that period that no such matters should exist or should appear of record, but that the administrator might deed without an order, I would not at this late day decide the titles void that were acquired under views of this kind entertained by those who then administered the laws, and for which titles a full and *bona fide* consideration was paid." To decide that the

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want of the certificate in this case was a fatal defect in the evidence of the probate of the will would in effect declare void the probate of every will made in the County of San Francisco during the period of five years from the establishment of the Probate Court. We do not think we are required by the facts of this case or authorized so to decide. Courts feel themselves constrained to uphold, where it is possible, cotemporaneous interpretation of statutes, under which interpretation rights of property have for many years been acquired. (*Panaud v. Jones*, 1 Cal. 448, and cases cited at 499; *Rogers v. Goodwin*, 2 Mass. 477; see also *Stuart v. Laird*, 1 Cranch, 299.)

Our conclusion is, that the evidence shows that the will in question was duly probated before the institution of the present proceedings.

Various objections and exceptions were taken by the appellants to the admissibility of evidence, but they related mostly to the proof of facts bearing upon the regularity of proceedings subsequent to the presentation of the petition, and were immaterial in this collateral proceeding. The other proofs bearing upon the presentation and character of the petition, to which objections were taken, were admissible as secondary evidence.

The order appealed from is affirmed.

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A JUDGMENT admitting a will to probate, made upon a petition stating all the necessary facts, and after the publication of due and legal notice of the application for probate, is conclusive of the validity of the will when called in question in any collateral proceeding or action.

APPEAL from the Twelfth Judicial District.

This was an agreed case for submission of a controversy without action, in which the plaintiff seeks to recover \$5,000 as the purchase price of a lot of land. By the contract of sale the defendant was to take the land at that price, provided the title was good. The plaintiff's title to the land was derived through the will of one

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Romain DeBoom, and the only question raised as to its validity was whether the will was properly and legally admitted to Probate. The agreed case states that the will was made in Belgium—that an authenticated copy of it was filed in the Probate Court of San Francisco, where the testator resided at the time of his death, together with a petition for probate by the person named as executor, in which petition were stated “all the necessary facts”—that due notice was given of the application as required by law, and that upon a hearing the will was duly admitted to probate, and thereupon recorded. The plaintiff had judgment and defendant appeals.

A. J. Gunnison, for Appellant.

The instrument presented for probate was only an authenticated copy of the will. (Sec. 27, Act to regulate the Settlement of the estates of Deceased Persons.)

Sec. 28th of the act requires the production of the will and the probate thereof.

Robt. C. Rogers, for Respondent.

The death of the testator, and his residence in the county, are the jurisdictional facts; these existing, every subsequent movement of the Court is the exercise of jurisdiction over the subject matter. (*Haynes v. Meeks*, 10 Cal. 110.) The jurisdiction of the Probate Court having attached, by reason of the death of the testator in the county, the order admitting the will to probate is not void. It could only be voidable. The jurisdiction of the Probate Court in matters pertaining to wills is exclusive, and its decrees are conclusive until set aside by a direct appeal. The jurisdiction extends over this class of cases, and its judgments cannot be questioned. (*Fisher v. Bassett*, 9 Leigh. 131; *Irwin v. Scriber*, 18 Cal. 499.)

NORTON, J. delivered the opinion of the Court—COPE, C. J. concurring.

The agreed case states that Cornelius DeBoom (the executor named in the will) filed in the Probate Court a petition for the probate of the will of Romain DeBoom, and filed therein an

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authenticated copy of said will, and that the petition stated all the necessary facts and was sworn to, and that due and legal notice was published. It is also shown that a judgment was entered admitting the will to probate, and that the will was thereupon duly recorded.

If, as is agreed, the petition stated all the necessary facts, then upon its presentation with a copy of the will, and the publication of due and legal notice, the Court acquired jurisdiction to probate the will, and the judgment of the probate thereafter entered is conclusive. If any irregularities occurred in the proceedings or error in the judgment after jurisdiction was acquired, they could only be corrected by a direct proceeding for that purpose, and cannot be inquired into in this collateral proceeding. (*Irwin v. Scriber*, 18 Cal. 499; *In the Matter of the Estate of Preston Warfield*, ante 51.) We do not, however, by this remark, intend to intimate that any error occurred in the probate proceedings.

Judgment affirmed.

THE PEOPLE v. PERRY MORRISON.

LANDS, within this State, belonging to the United States, are, both by the provisions of the State revenue law, and by the terms of the Act of Congress admitting California into the Union, exempt from State taxation.

In order to hold improvements upon public lands liable for a State tax the assessment must be upon the improvements *eo nomine* and not upon the land itself.

APPEAL from the County Court of Alameda County.

The facts are stated in the opinion.

E. W. F. Sloan, for Appellant.

I. The assessment in question is without authority of law and is void: because 1st, the property in respect to which it was made is, by the revenue law, expressly exempt; 2d, it is exempt from taxation and assessment by the express terms of the compact between this State and the United States, upon which this State was admitted into the Union.

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1. The Revenue Act of 1861, Sec. 5, might, upon a superficial view seem to warrant the assessment in question. The appellant was in possession of the land and claims an ultimate right of pre-emption thereto. But the whole act must be construed together; and by Sec. 4 "lands belonging to the United States" are exempt in express terms.

If it had been the intention of the Legislature to treat the possession of public lands belonging to the United States as an estate or property in the hands of the possessor, properly subject to taxation, they would have qualified the designation of those exempt from assessment by words of limitation, such as: "lands belonging to the United States not in the possession or occupation of any one." But there is no such qualification in the act.

The "estates," therefore, mentioned in Sec. 5 must be supposed to refer alone to estates in lands which, by grant, confirmation, sale, or otherwise, have become private property, and which cannot be lands belonging to the United States. (*Dixon v. Porter*, 1 Cash. 23, Miss. 84; *Smith v. The State*, 5 Texas, 397.)

2. The Act of Congress, admitting this State into the Union, imposed certain terms and conditions, which being accepted by the State, are in the nature of a compact, which cannot be disregarded by the people of the State. (1 U. S. Stat. at Large, 452, Ch. 50, Sec. 3.)

Similar terms were imposed upon each of the States formed within the Northwest Territory by the Ordinance of 1787, and I have not been able to find a single instance, in which either of those States has attempted to lay a tax upon public lands of the United States, on the ground that it was possessed or occupied by a person or company.

In *Carroll v. Stafford* (3 How. 441) the right of the State of Michigan to levy a tax upon land already sold by the United States to a private individual, and actually paid for, but prior to the issuance of the patent to the purchaser, was questioned, but the right was sustained.

It is well known, that under our land system the purchaser often receives his certificate of sale for months and even years, before a patent is issued. Upon payment of the purchase money and the

receipt of a duplicate certificate acknowledging that fact and describing the land sold, the purchaser becomes to all intents and purposes the proprietor. Indeed, most of the Western States, by express legislation, or otherwise, regard the certificate of entry and sale as conferring a legal title.

It was upon this view of the case in *Carroll v. Stafford* that the decision was made. "Now," says the Court "lands which have been sold by the United States, can, in no case, be called the property of the United States. They are no more the property of the United States than lands patented. So far as the rights of the purchaser are considered, they are protected under the patent certificate as fully as under the patent. (p. 461.)

It will be seen, that the right of the State of Michigan to tax the land, or the party in possession of it, in respect to the land so possessed, prior to the actual sale and payment of the purchase money, was not even contended for.

The compact of admission between Ohio and the United States, secured to the purchasers of public lands in that State, an exemption for five years after the date of their respective purchases. And, though that State claimed and exercised the right of taxing all other lands within her limits, even before they became the property of private individuals, yet she never pretended to violate or disregard the terms of the compact by laying a tax upon lands sold by the United States, until the period of five years had elapsed. (*Douglass v. Dangerfield*, 10 Wilcox, 154-156.)

I am not able to say, in how many other States a similar exemption may have been secured by compact; but, by an Act of Congress, approved January 26th, 1847, the assent of the United States was given to the several States admitted into the Union prior to April 24th, 1820, to impose taxes upon all lands thereafter sold by the United States, from and after the day of sale.

That act was deemed necessary to relieve those States from the restraint imposed by the compact of admission, as to all lands thereafter sold. No State, as far as my researches have extended, has ever attempted, by legislation or otherwise, to violate the terms of the compact. We are not to construe the Revenue Law of 1861 in such a way, as to place the State of California in that attitude.

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II. The fact that the appellant claims a right of preëmption, cannot vary the case. The right of preëmption depends upon prior occupation, cultivation, and improvement. It is not the subject of traffic or trust, so long as it is a mere right to purchase at the prescribed price; a right which can only be preserved by continuous occupation and improvement. So soon as the possessor actually preëmpts, so soon as he pays the purchase money and gets his certificate thereof, it ceases to be a mere preëmption right or claim, and then becomes subject to taxation. Until that time, however, the land so occupied is land belonging to the United States. In attempting to lay a tax upon such land, the State would violate the terms of the compact in another particular. It would, if carried out, interfere with the primary disposal of the public lands on the part of the United States. It would defeat the operation of the preëmption laws, which provide one of the modes of primary disposition. The wealth produced by the cultivation of the public lands is the legitimate subject of taxation, and has contributed its thousands to the revenues of the State. The lands, so long as they remain the property of the United States, are exempt.

W. W. Crane, for Respondent.

“The lands belonging to the United States” (*vide* Revenue Laws of 1861, 420, Sec. 4), within this State, are those held by the Federal Government as property, and as to those lands the General Government occupies a position analogous to a private proprietor. This being the case, and there being no compact or legislation to the contrary, the United States, like all other proprietors, would be liable to assessment on account of its property and would be called upon to pay its quota of taxation.

But to avoid a consequence of this character, the Act of Congress, admitting this State into the Union, provides that the State of California “shall never lay any tax or assessment of any description upon the public domain of the United States,” evidently meaning that as between the State of California and the United States the former shall not exact against the latter any public dues. To fulfill the compact thus entered into, this State has uniformly ex-

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empted from taxation "all lands belonging to the United States." But as between Perry Morrison, the appellant here, and the State of California, an entirely different relation exists. He cannot claim an exemption which the latter has only granted in favor of another proprietor, viz.: the United States. The whole scope of our revenue system is, to exact the public dues, primarily, from the citizen, and secondarily, from the property in respect to which he is assessed. The assessor is required to prepare a list in which shall appear: 1st. The names of the taxable inhabitants. 2d. All real estate taxable to each inhabitant. (Revenue Law of 1861, Sec. 20.)

Real estate is defined in Sec. 5 (p. 421): "The term 'real estate,' whenever used in this act, shall be deemed and taken to mean and include the ownership of, or claim to, or possession of, or right of possession to, any land within the State."

The form of the assessment roll, which is given in Sec. 20 (p. 426), has in the first column the tax payer's name, and in the second the description of the property, indicating plainly that the assessor has fulfilled his duty when he has given the tax payer's name, and designated the lands in which he has an ownership, or claim to, or possession of, or right of possession to. Nothing in the act requires this officer to designate the quantity or extent of the tax payer's interest in the lands described. If the full value of the fee be assessed when in fact the tax payer has merely a possessory right in the premises, a remedy is at hand, by an application to the Board of Equalization (*vide* Sec. 23, p. 427) to change and correct the valuation. It would be imposing a very onerous task upon the assessor to compel him to investigate and determine the character of each tax payer's title to lands in possession or claimed by him.

If, as in the case at bar, the tax payer be in possession of lands belonging to the United States, and he fails to pay the taxes assessed to him, in respect to such lands, and a suit is brought against him and the land to recover the amount due, a judgment is had and the property sold by the Sheriff, the purchaser would not obtain the fee from the United States, but only the right, title, or interest that the delinquent had in the premises. If the interest is only the right of

possession, the buyer would get nothing more. As against all the world but the United States the appellant was the owner of the premises sued. He can maintain any action hinging upon the possession. He can sell or mortgage his possessory rights, and he even has an equity as against the United States, that is, a preëmtor's equity. Why should he not be taxed for such lands? No sound rule of public policy can be urged why he should not. On the contrary, if the citizen be taxed upon the values he has, then appellant's possession, which has a value, is taxable.

II. The decisions of the Supreme Court of this State sustain the position advanced by respondents. *Hicks v. Bell* (3 Cal. 227) holds that, as to the ownership of the public lands, the United States only occupy the position of any private proprietor, with the exception of an express exemption from State taxation. *The State v. Moore* (12 Cal. 69) holds that, notwithstanding the gold mines are the property of the United States, the interest of the possessor is subject to taxation, as such possessor has a qualified ownership in his claim.

CROCKER, J. delivered the opinion of the Court—COPE, C. J. and NORTON, J. concurring specially.

This is an appeal from a judgment for taxes, rendered by the County Court of Alameda County. The action was commenced before a Justice of the Peace, to recover the sum of sixty dollars, State and county taxes upon a tract of one hundred and sixty acres of land, occupied by the defendant as a settler upon the public domain of the United States. Judgment was rendered against the defendant by the Justice of the Peace, from which he appealed to the County Court, where it was affirmed, and he now appeals to this Court, alleging that the property, being a part of the public domain of the United States, is not liable to be taxed by the State of California.

An agreed statement of the facts was filed in the case, by which it was agreed, among other things, substantially, that the land was a portion of the public land of the National Government; that the defendant had for a long time been in the actual occupation of it, residing upon, using, and cultivating the same for agricultural pur-

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poses, without claim of title, except such as arises from possession and occupation ; that the taxes levied upon the improvements upon the land and defendant's personal property had been paid, and that the taxes sued for were levied upon the land and not the improvements.

A copy of the assessment appears in the transcript which shows that the property was described as follows: "A tract of land bounded on the north by the lands of D. D. Herrion, on the east by the lands of William Morrison, on the south by lands of Overacker, on the west by the land of Tyson;" one hundred and sixty acres, valued at \$2,000.

The appellant claims that the assessment is void: 1st. As being exempt from taxation by the revenue law. 2d. As being exempt by the compact between this State and the United States, upon which California was admitted into the Union; that the judgment rendered by the Court below is, therefore, erroneous, and should be reversed.

1. Is the property exempt from taxation under the revenue laws of this State? Sec. 4 of the Revenue Law of 1861 provides, among other things, that "all property, of every kind and nature whatsoever, within this State, shall be subject to taxation, except: *First*—all lands and lots of ground, with buildings, improvements, and structures thereon belonging to the State, or to any municipal corporation, or to any county of the State, *and all lands belonging to the United States*, or to this State; and all buildings and improvements belonging to the United States, or to this State."

Sec. 5 of the same act provides that: "The term 'real estate,' whenever used in this act, shall be deemed and taken to mean and include, and it is hereby declared to mean and include, the ownership of or claim to, or possession of or right of possession to, any land within the State; and the claim by, or possession of any person, firm, corporation, association, or company, to any land, shall be listed under the head of real estate."

The assessment in this case is of the land itself, and not of the possession or right of possession of the defendant, and being admitted to be "land belonging to the United States," it is clearly exempt from taxation by the revenue act.

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2. Is it exempt from taxation under the Act of Congress admitting the State of California into the Union ?

Sec. 3 of that act, among other things provides, " that the said State of California is admitted into the Union upon the express condition that the people of said State, through their Legislature or otherwise, shall never interfere with the primary disposal of the public lands within its limits, and shall pass no law or do no act whereby the title of the United States to, and right to dispose of the same, shall be impaired or questioned ; and *that they shall never lay any tax or assessment of any description whatever upon the public domain of the United States,*" etc.

The evident object of this provision is to encourage the settlement of the public lands, and thus secure their speedy sale. The act is plain and explicit in its terms, and leaves no room to doubt the intention of Congress. The object is a worthy one, for the heavy expense of cultivating and improving vacant lands soon exhausts the means of the settler, unless he be wealthy, which that class seldom are. It is an inducement held out to the citizen to undertake the hardships and toils of a pioneer life, bring the public domain under cultivation, and thus increase the wealth of the country. The exemption is generally only for a few years, until the surveys can be perfected and the land brought into market. The State has wisely coöperated with the National Government by expressly exempting the land from taxation by her revenue laws.

If this judgment should be affirmed, and the public officers should proceed and sell the land, the purchaser would obtain no title to the premises, as has been already decided by this Court. In the case of *Hall v. Dowling* (18 Cal. 621), Justice Baldwin, in delivering the opinion of the Court, uses this language : " We cannot see that the plaintiff makes out title through the tax deed ; for this seems to have been public land of the United States, and therefore could not be sold for taxes. If the taxing of the improvements were proper, then the deed, etc., should show this, and not a sale of the fee or a taxing of the land itself." In the present case it is clear that the fee of the land is taxed, which is contrary to law, and void.

We do not intend, by this opinion, to pass upon the principles laid down by this Court in the case of *The State of California v. Moore*

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(12 Cal. 56). The questions there decided differ entirely from the present one.

The judgment is reversed, and the action is ordered to be dismissed.

NORTON, J.—The exemption of “all lands belonging to the United States” from taxation by the Revenue Act of 1861, in pursuance of the condition in the Law of Congress admitting this State into the Union, “that they shall never levy any tax or assessment of any description whatever upon the public domain of the United States,” renders any tax invalid which is imposed upon any portion of the public lands of the United States within this State. Although the definition of the term “real estate” given in Sec. 5 of the Revenue Act, embraces the “possession of” land, and by Sec. 20, all the “real estate” is to be assessed, this obviously refers to a possession of land which is liable to taxation. The tax is imposed by the first section, and that is imposed only on lands “not by this act exempted from taxation.” Church and school lots, and lots used for other purposes of a like general nature, and which are exempted by Sec. 4 from taxation, are certainly not liable to be taxed, because, being in the possession of some individual or corporation, they would fall within the definition of “real estate” as given by Sec. 5. This view is also obvious from the distinction made in Sec. 20, between “improvements on real estate,” and “improvements on public lands.” Public lands are thus spoken of as being different from the real estate which, under this act, is subject to taxation.

I agree, therefore, that the judgment should be reversed, and the action dismissed.

CORP, C. J.—I am of the same opinion as my associates as to the invalidity of the assessment in question, and concur with them in the judgment of reversal.

Quinn v. Kenyon.

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THE power to grant new trials is one of legal discretion, and the abuse of that discretion only will justify an interference with such order by the Appellate Court.

Where, in an action of forcible entry and detainer, plaintiff had judgment in the Justice's Court for twelve dollars damages and twenty dollars fine, besides costs, from which defendant appealed to the County Court, where the action was dismissed and afterwards a new trial granted: *held*, that it was doubtful whether the Supreme Court had jurisdiction of an appeal from this order, and the point was left open for further consideration.

APPEAL from the County Court of San Joaquin County.

This was an action of forcible entry and detainer, brought in a Justice's Court in San Joaquin County. In that Court the defendant moved to dismiss, on the ground that plaintiff could not maintain a civil action, and supported the motion with proof that he (plaintiff) had been recently convicted of the crime of perjury, and was then under a sentence of imprisonment therefor for two years in the State Prison.

Plaintiff showed, in opposition, that he had appealed to the Supreme Court from the judgment of conviction, and had been admitted to bail on said appeal, and that he was now at large, and the appeal still pending. The Justice overruled the motion, and plaintiff had judgment for twelve dollars damages, besides costs and restitution, and a fine of twenty dollars was imposed on defendant.

The latter appealed to the County Court, and there renewed the motion to dismiss which, on the same showing of facts, was granted. Plaintiff moved for a new trial on the ground that the Court had erred in matters of law, to wit: in dismissing the action on the facts shown. After argument, the Court granted the motion and ordered a new trial, from which order the defendant appeals.

Brown & Graves, for Appellant.

John B. Hall, for Respondent.

CROCKER, J. delivered the opinion of the Court—COPE, C. J. and NORTON, J. concurring.

Orosco v. Gagliardo.

This was an action of forcible entry and detainer, brought in a Justice's Court in San Joaquin County. The plaintiff recovered judgment in the Justice's Court, and the defendants appealed to the County Court, where the action was dismissed; but on motion of the plaintiff a new trial was granted, and the defendant appeals from the order granting the new trial. The judgment in the Justice's Court was only for twelve dollars damages and twenty dollars fine, besides costs.

This Court has repeatedly decided that the power to grant new trials is one of legal discretion, and the abuse of that discretion only will justify an interference with the order. It is only in rare instances and upon very strong grounds that this Court will set aside an order granting a new trial, and this is not a case which calls for the exercise of that power.

In this case, it is doubtful whether this Court has jurisdiction of the appeal; but as that point was not argued, we leave it open for future consideration. (See *Paul v. Silver*, 16 Cal. 75.)

The order granting the new trial is affirmed, and the cause remanded for further proceedings.

OROSCO v. GAGLIARDO.

AN alien does not become a citizen of the United States by filing his declaration of intention to become a citizen. He does not acquire the full rights of a citizen until he has taken the final oath of citizenship.

The United States Courts have no jurisdiction, based upon the citizenship of the parties, over actions between aliens and aliens, but only over actions between citizens and aliens.

Under the Act of Congress of 1789 and the statute of this State of 1855 respecting the transfer of actions from a State to a United States Court, the Court to whom the application is made must, before granting it, be satisfied that the application is founded upon facts which entitle the applicant to the order, and for this purpose has the right to inquire into the truth of the facts set forth in the petition as well as to investigate the sufficiency of the security.

APPEAL from the Thirteenth Judicial District.

The facts are stated in the opinion.

Orosco v. Gagliardo.

Lewis Shearer, for Appellant.

I. Under our statute, after the acceptance of the surety, the District Court had no jurisdiction in the case further than to direct its transfer; and that, even though it appeared that the Court to which the transfer was sought, had no jurisdiction. In the case mentioned in the act, the Court, upon the claiming of the privilege accorded to the alien, is wholly divested of its jurisdiction. But even if the Court could consider the question of jurisdiction of the United States Circuit Court, in any case arising under the act referred to, it could only do so when the fact of the alienage of both parties was presented to it in some manner previous to the acceptance of the surety. It could not take cognizance of it from a statement made in an affidavit, the production of which in the case, after the acceptance of the surety, the act provides "shall be void and of no force or effect for any purpose whatsoever." The record shows that the fact of the alienage of the plaintiff Orosco, was only disclosed by this affidavit. The act does not even permit the facts in the petition for transfer to be controverted by affidavit, much less allow new facts, foreign in their character, to be interposed in opposition to the transfer. The transfer is imperative upon the Court, the requirements of the act being complied with on the part of defendant seeking the transfer.

II. The Circuit Court can entertain jurisdiction in the case. (*Mason et al. v. Ship Plaireau*, 2 Cranch, 240, opinion by Marshall, C. J.) The defendant cannot question the jurisdiction after transfer.

J. G. McCullough, for Respondent.

The attorneys for the petitioner claim a difference between the United States law, and our State law, in regard to transfer of cases. I presume the fact that our State law is different can confer no additional jurisdiction upon a United States Court; but the laws are almost exactly alike, and there is no difference in substance. That a Circuit Court has no jurisdiction in suits between aliens was decided as long ago as 1809, in case of *Mantalet v. Murray* (4 Cranch, 46), and in various cases since, and that a declaration of

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intention cannot change the position of the parties, was decided also in the case of *Baird v. Byre*, referred to in Brightly's United States Digest of Laws (p. 9, note *h.*)

CROCKER, J. delivered the opinion of the Court—COPE, C. J. and NORTON, J. concurring.

This is an application to this Court for a writ of *mandamus*, to issue to the District Judge of the Thirteenth Judicial District, commanding him to remove the said cause to the United States Circuit Court for the Northern District of California, under and in pursuance of the Act of Congress of September 24th, 1789, and the statute of this State of April 9th, 1855. The application for a transfer of the cause was made by the defendant in the District Court of Mariposa County, on the ground that he was an alien, and that the plaintiff was a citizen of the State of California. The plaintiff, in answer to the application, showed that he was also an alien and not a citizen—that he had only filed his declaration of intention to become a citizen and had never taken the final oath of citizenship. The District Court, on this state of facts, refused to transfer the cause, and the defendant now applies to this Court for a peremptory *mandamus*, to compel the transfer.

We think the District Court properly refused the application. The plaintiff in this case is not a citizen of this State, or of the United States. He does not become entitled to the full rights and privileges of citizenship until he has taken the final oath, as required by the naturalization laws. (*Baird v. Byre*, 3 Wallace, Jr., cited in Brightly's Digest, 9, note *h.*) Until he takes the final oath he may retract his intention and decline to avail himself of the rights of citizenship, and could, if he desired, still claim the privileges of a subject of a foreign power.

It is well settled that the United States Courts have no jurisdiction over suits between alien and alien, but that they are confined to actions between citizens and foreigners where their jurisdiction is founded upon citizenship. (*Mossman v. Higginson*, 4 Dallas, 12; *Montalet v. Murray*, 4 Cranch, 46; *Hodgson v. Bowbank*, 5 Id. 303; *Jackson v. Twentymen*, 2 Pet. 136.) It follows that the defendant had no right to have the cause removed to a United

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States Court; and if it had been so removed, upon the true facts appearing to the latter Court, it would have been compelled to remand the case back for want of jurisdiction.

The statute of this State, respecting the removal of causes from the State Courts to the United States Court, provides, that when the petition is filed and the surety is offered, "it shall then be the duty of such Court of this State to accept the surety and proceed no further in the cause; and all subsequent proceedings which may be taken or had in such Court in contravention of the provisions of this section shall be void and of no force or effect for any purpose whatsoever." The defendant contends that, under this provision, when the petition is filed and the surety is offered, the State Court can do no further act in the case, except to accept the surety and order the removal. This is not the proper construction. The Court must first be fully satisfied by proper evidence that the application for removal is founded upon facts which entitle the applicant to the order, and for this purpose the Court has a right to inquire into the truth of the facts set forth in the petition, as well as investigate the sufficiency of the surety, and determine the matter accordingly. We see no error in the decision of the Court below; the motion for a *mandamus* is therefore denied.

MATHEWSON v. FITCH.

THE defendant, by a written contract, agreed to pay the assignors of the plaintiff five hundred dollars whenever they should secure a final decree of the Supreme Court in any of the cases now pending, or hereafter instituted, in which the "Sisters" (referring to the daughters of one Peralta, deceased), claim adversely to the title under the will (of Peralta), which shall declare the said sisters' title null, and that the title of the "Peralta Sons is the only valid title under the will." An ejectment case was then pending on appeal, in the Supreme Court, for a portion of the land devised by Peralta, in which the plaintiff's assignors, acting as attorneys, procured a decision that the plaintiff therein, who claimed under the "Sisters," had no title, and that the defendant therein, who claimed through the sons, *under the will*, had a title which was valid: *held*, that this decision was a compliance with the condition of the agreement, and entitled plaintiff to recover the five hundred dollars.

If A promises B to pay him a sum of money if he will do a particular act, and B

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does the act, the promise thereupon becomes binding, although B at the time of the promise does not engage to do the act.

Where a complaint avers that plaintiff did certain work in consideration of a promise by the defendant, an answer denying that plaintiff did the work, but not claiming that it was done upon any other consideration than the promise, raises no issue, except as to the performance of the work, and requires no proof from plaintiff as to the consideration upon which it was performed.

The offense of Maintenance is unknown to the laws of this State.

APPEAL from the Third Judicial District.

The complaint in this case sets forth in substance :

That there had been a judgment rendered in the District Court of the Fourth Judicial District, in favor of the defendant, in an action of ejectment wherein one Adams was plaintiff, and one Lansing defendant. That the plaintiff, Adams, in that action, claimed the exclusive title of the land sought to be recovered therein, through and under the will of Luis Peralta. That by said will the premises then in controversy, as well as the whole Rancho of San Antonio, of which said premises were a part, were devised to the four sons of said Luis, from and under whom defendant therein derived his title. That the plaintiff, Adams, in that case claimed to derive his title from the daughters of Peralta, alleging that the "will" was invalid, and that the rancho descended in equal proportions to all the sons and daughters of Peralta in common, and that he, Adams, was therefore entitled to recover a portion of the premises sued for.

That on the trial of the action in the said District Court judgment was rendered in favor of defendant, Adams, thereby confirming the "will" as valid, and thus, in effect, deciding that by it the four sons had a valid title to the San Antonio Rancho, and that the daughters, their "sisters," had no title whatever thereto.

That an appeal had been taken from said judgment, and said appeal being then pending and undetermined in the Supreme Court of the State of California, the defendant Fitch, on the fifth day of February, 1861, made and delivered to E. W. F. Sloan and D. P. & A. Barstow (who were attorneys for defendant in case of *Adams v. Lansing*), an agreement in writing, in the words and figures following, viz. :

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“ Memorandum of an agreement between C. L. Fitch, first part, and E. W. F. Sloan and D. P. and A. Barstow :

I, the undersigned, do hereby agree to pay to E. W. F. Sloan and D. P. and A. Barstow the sum of five hundred dollars on demand after the said Sloan and Barstow shall (as attorneys) have secured a final decree of the Supreme Court in any of the cases now pending, or hereafter instituted, in which the “ sisters ” claim adversely to the title under the “ will ”—which shall declare the said sisters’ title null, and that the title of the “ Peralta Sons ” is the only valid title under the “ will. ” Provided, such decision of the Supreme Court be obtained by and through the efforts (as attorneys) of said Sloan and Barstows on or before the first day of January, 1862.

Encinal San Antonio, February 5th, 1861.

CHAS. L. FITCH.”

The complaint then avers that said Sloan and Barstows did well and faithfully perform the legal services aforesaid, mentioned in said agreement, and did, on the seventh day of May, 1861, by their legal services as attorneys, secure a final decree and decision of said Supreme Court, in said case of *Adams v. Lansing, etc.*, which declares that the title derived under said “ will, ” by his said sons, was the only valid title to said rancho, and that the adverse claim thereto, of the said “ sisters, ” was null and void.

The complaint further avers that on June 29th, 1861, payment of said sum of five hundred dollars was demanded of said Fitch, and refused by him, and that the said contract was afterwards, and before this action was commenced, assigned to plaintiff, and demands judgment for said five hundred dollars and interest.

The defendants answered, denying that on the seventh day of May, 1861, or at any other time, the said Sloan and Barstows, by their legal services, or otherwise, secured in said Supreme Court a final decree or decision in said case of *Adams v. Lansing*, which declared that the title derived under said will by his said sons was the only valid title to said rancho, and that the adverse claim thereto of said “ sisters ” was null and void. Upon this issue the cause was tried by the Court.

The only evidence given upon the trial was the report of the case

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of *Adams v. Lansing*, as contained in 17 Cal. 624, which report is, by stipulation, made a part of the record. Upon this evidence the Court made its findings, and rendered its judgment for the amount claimed in favor of the plaintiff. Defendant moved for a new trial, which was denied, and from this order and the judgment he appeals.

A. M. Crane, for Appellant.

I. The contract upon which the suit is predicated is void for maintenance.

Fitch, the defendant, hires three attorneys-at-law (Sloan and the two Barstows) to prosecute an appeal in the Supreme Court, pending between Adams and Lansing, and agrees to pay them five hundred dollars if, within the time limited, they obtain a certain kind of decree or decision.

With this case, so far as shown by the complaint, Fitch has no sort of connection whatever, either by relationship to either of the parties, or by being interested in the title involved.

We have, it is true, no statute against maintenance, but it was an offense at the common law, and the contract set forth in the complaint is *prima facie* so clearly void, for the cause alleged, that I do not deem it necessary to dwell upon the point further than to refer the Court to the following authorities :

(Wharton's Law Dic. title Maintenance, 603 ; *Thalheimer v. Brinkerhoff*, 3 Cow. 623, and cases there cited.)

II. The contract, or writing, set forth and signed by Fitch alone is void for want of mutuality.

Fitch undertakes, or agrees, to pay Sloan and the Barstows five hundred dollars upon their performing certain services, and obtaining a specified decision, but the Barstows and Sloan do not in any manner obligate themselves to do the services.

Fitch could have sustained no action against them for not performing the services specified.

The case of *Tucker v. Woods* (12 Johns. 190) is in point, and to that case and the authorities there cited, viz : *Cook v. Oxley* (3 Tenn. 653) ; 12 Ind. 397 ; 1 Chitty, 297 ; 1 Carries, 594 ; *Tuttle v. Love* (7 Ind. 470)—the Court is referred.

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The principle sustained in all these cases, as well as in the elementary works on the law of contracts, is this: That in contracts where the promise of one party is the consideration for the promise of the other, the promises must be concurrent and obligatory on both at the same time. Such, most clearly, was not the case here; as conclusive upon this point see *Utica & Schenectady R. R. Co. v. Brinkerhoff* (21 Wend. 139).

III. The contract or writing set forth has no consideration to support it.

It does not appear by it, or by any averment in the complaint, how or in what manner its performance could in any way benefit the defendant, Fitch, or how or in what manner it could inconvenience the Barstows or Sloan. It may be said that Sloan and the Barstows were to perform services as attorneys in the case named, and that this was a sufficient consideration. But we learn from the complaint itself, as well as from the reported case of *Adams v. Lansing*, that they were, before said writing was made by Fitch, already the attorneys in the case, engaged in defending the appeal. Such being their position—being already retained by Lansing in the case—it was their duty to use all the skill and ability they possessed in the case under the retainer and employment of their client, and consequently they had no commodity of that sort left to dispose of to Fitch. Or, in other words, they could not possibly make any effort, or put forth any ability in consequence of the bargain with Fitch, which they were not already bound to exercise, and it is presumed would have exercised under their retainer by Lansing.

IV. No such decree or decision has been obtained from or rendered by the Supreme Court as was to be obtained or rendered as a condition precedent to the payment of the five hundred dollars by Fitch. The complaint alleges that they did, in said case of *Adams v. Lansing*, obtain a decision which declares that the title derived under the will was the only valid title to the said ranch (*i. e.* the Peralta Ranch) and that the claim adverse to the said will thereto was void. This allegation of the complaint is specifically denied by the answer. The plaintiff then, to sustain his case, upon this issue produces and reads in evidence the report of the

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case of *Adams v. Lansing* (17 Cal. 629) and this is all the evidence given.

Does this case prove that the title under the will is the only valid title to the Peralta Ranch? Was any such question ever made or passed upon by the Court? Was the validity of the will ever drawn in question? And much more, was the validity of any other title—much more—all other titles ever passed upon by the Court? The undertaking was to procure a decision declaring that the title acquired under the will was the only valid title to the rancho named. But nothing of this kind is decided in *Adams v. Lansing*, as we read the case. It was an ejectment for five-ninths of a town lot in Oakland, which lot was a part of the Peralta Ranch.

The will, so called, was produced by the defendant in order to show a conveyance by Luis Peralta to his sons, and thus determine that the sisters, under whom Adams claimed, had no title. The only question passed upon by the Court, or decided, was as to the construction of this paper, conveyance, or will. Admitting it to be genuine and valid, the Court holds that its effect was to convey the land to the sons. And this is all the case decides.

Suppose that on another trial, involving another portion of the ranch, it should be clearly shown and found by the Court or jury that Luis Peralta was, at the time of executing this paper, *non compos mentis*; what, then, becomes of the title under it? Or suppose it shown that its execution was obtained by fraud—what then? Could the decision in *Adams v. Lansing* be appealed to as a final decree or decision fixing forever the validity of the sons' title under it? And yet this is what the writing signed by Fitch stipulates for, and what the plaintiff is bound to prove has been done under the issue made by the complaint and the answer.

When the plaintiffs have proved, as they are bound to do, that the title under this will is not only valid, but is the "only valid title" to the ranch, and shall have obtained a decision of this Court to that effect, they will have sustained the issue on their part and not until then.

E. W. F. Sloan, for Respondent.

I. A contract should be so construed *ut res magis valeat quam*

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percat. This rule particularly applies where the consideration of the contract is executory as in the case at bar. (*Cobbs v. Fountaine*, 3 Rand. 487.)

It is not denied that *Adams v. Lansing* was, at the date of the contract, pending on appeal in the Supreme Court, or that it was one of the cases referred to in it. The subject matter in litigation was a lot of land, being part of the San Antonio Ranch originally belonging to Luis Peralta, deceased. Adams asserted title to an undivided interest to said lot through certain mesne conveyances from the daughters of said Luis Peralta. Lansing claimed title to the whole under the sons. The case depended on the question whether the sons had become vested with a title to the whole ranch under the instrument called a "will," or whether it vested in all the children by descent. By reference to the report of the case, which is made evidence, it will appear that the question was decided in favor of the sons.

It is true that was not a proceeding *in rem*, in which the execution of the instrument, as a matter of fact, was or could be proved for all purposes. It was known not to be so. The instrument was not susceptible of such proof so far as it related to the San Antonio Ranch. But its legal character received a settled construction. Nothing else could have been contemplated by the contract.

It may be doubted whether a particular deed contains words sufficient to pass an estate in land. But it is read in evidence, spread on the record, and comes up for judicial determination. A decision that the words are sufficient is a final settlement of the question in all cases where it arises, although the execution of the deed must be proved in all cases where it is offered in evidence.

II. The agreement does not present a case of concurrent consideration depending upon mutual promises. It is an undertaking to pay so much on condition that the attorneys would successfully perform the legal services mentioned. The performance was an acceptance on their part. The plaintiff alleged and proved the performance, and thus established a cause of action. (*Poughkeepsie and Salt Point P. R. Co. v. Griffin*, 21 Barb. N. Y. 454; *Chit. on Cont.* 63; *Cobbs v. Fountaine*, 3 Rand. 487.)

III. A continuing consideration, being one in part executed

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and in part to be executed, is a sufficient consideration. (*Loomis v. Newhall*, 15 Pick. 159; *Wiggins v. Keiser*, 6 Ind. 258.) The material allegation in the complaint is, that in consideration of the making and delivery of the contract the legal services were performed.

IV. The contract is a lawful one. (*Thallheimer v. Brinkerhoff*, 3 Cow. 647; *Perine v. Dunn*, 3 Johns. Ch. 518, 519; *Benedit v. Stuart*, 23 Barb. 420; *Ogden v. Des Arts*, 4 Duer, 275; *Wright v. Meek*, 3 Iowa, 472.)

NORTON, J. delivered the opinion of the Court—COPE, C. J. concurring.

The obtaining the judgment which was rendered in the case of *Adams v. Lansing* (17 Cal. 629) was a performance of the condition upon which the defendant's promise to pay the five hundred dollars depended. It may be readily imagined that the defendant supposed the decree which was to be obtained would forever settle the title of the parties claiming under the "will," but that is not the thing specified in the written promise. That only requires that the decree in some case then pending, or thereafter to be instituted, should declare the sisters' title to be void, and the sons' title to be the only valid title under the "will." The Supreme Court in that case rendered a judgment that the plaintiff who claimed under the sisters had no title upon which he could recover, and that the defendant who claimed through the sons under the "will" had a title which entitled him to recover. This was, in effect and substance, a decree in that case that the sisters' title was null and void, and that the title of the sons under the "will" was the only valid title.

The promise was not a contract depending upon a mutual promise for a consideration. The doing of the thing specified constituted the consideration which made the promise binding. In the case of *Train v. Gold* (5 Pick. 380) the Court state the rule in these words: "Thus, if A promises B to pay him a sum of money if he will do a particular act, and B does the act, the promise thereupon becomes binding, although B at the time of the promise does not engage to do the act. In the intermediate time the obligation of

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the contract or promise is suspended ; for, until the performance of the condition of the promise there is no consideration, and the promise is *nudum pactum* ; but on the performance of the condition of the promise, it is clothed with a valid consideration which relates back to the promise, and it then becomes obligatory." To the same effect is the case of *Lousdale v. Brown* (4 Wash. 148).

The argument that the promisees have done nothing in consequence of the promise, because they were already retained in the action by other parties, and were under obligation to render these services, is not valid. The complaint avers that the work was done in consideration of the promise. The answer denies only the doing of the work, and does not claim that it was done for any other person or for any other consideration. When the doing of the work was proved, the cause of action set forth in the complaint was proved under the issue presented by the answer.

Nor is the contract void as being contrary to the policy of any law of this State in regard to maintenance. That offense was created by statute in England in early times, in order to prevent great and powerful persons from enlisting in behalf of one party in a lawsuit, by which the opposite and feeble party would be oppressed and prevented from obtaining justice. It has been said by English Judges that under the enlightened and impartial administration of justice in later times the object of the law had ceased and the law itself had become nearly obsolete. It has been said in America that the law against maintenance was peculiar to early English society, and inapplicable to American society, and, therefore, that it would not exist here unless by statute enacted here. At an early day in the history of the State of New York a statute was enacted against maintenance. At the revision of the laws of that State in 1830, the revisors, in a report to the Legislature, say : " It is proposed to abolish the law of maintenance and to qualify that of champerty, by permitting mortgages of lands in dispute to raise money, under guards and restrictions which will prevent abuse," and the mode adopted to " abolish the law of maintenance " was simply to omit enacting any statute upon the subject and repealing the old statute by which it was created or adopted. There was no special repeal of this old statute, but it was included in the general

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repealing act, nor was there any law directly abolishing the offense of maintenance. Under these circumstances Judge Paige, in the case of *Hoyt v. Thompson* (1 Selden, 347) said: "Since the adoption of the revised statutes, maintenance has not, under our laws, been recognized as an offense, and champerty only remains an offense in a qualified form." Chancellor Walworth, in the case of *Mott v. Small* (22 Wend. 405) said: "I am prepared to say that all the absurd doctrines of maintenance that grew out of the statutes which might have been necessary in a semi-barbarous age were swept away by the recent revision of the laws, and many of them had been virtually abrogated long before that time." Chancellor Sanford, in the case of *Thellheimer v. Brinkerhoff* (3 Cowen, 647) said: "In many States of this Union these laws are not in force, and the want of them is said to be no inconvenience." These remarks show that, in the opinion of these Judges, in the absence of a statute creating it, the offense of maintenance does not exist in America as a part of the common law. There is no statute upon the subject in this State, and we have no doubt that the Legislature of 1850, when it adopted the statutes which were deemed necessary to organize the legal system of the State, by omitting to enact any such statute, acted in the spirit of the decisions which hold such laws inapplicable to this country, and with the direct purpose that there should be no law relating to the subject. In our judgment, in the absence of such a statute, the offense of maintenance is unknown to the laws of this State.

Judgment affirmed.

CULLERTON v. MEAD.

A REMEDIAL statute, when the meaning is doubtful, must be construed liberally, and so as to extend the remedy.

In construing a particular section of a statute, it should be considered together with the other sections, and its language so interpreted as to give to it utility and effect, and to make it compatible with common sense and the dictates of justice.

A creditor of the estate of a deceased person, who is absent from the State during the whole period of publication of the notice to creditors, and has no actual

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knowledge of the publication, may present his claim to the administrator at any time before the decree of distribution is entered. No other proof of absence will be required than his own affidavit. Nor will the time for filing his claim be limited by the fact of his return to the State before the expiration of the ten months, within which, by the terms of the notice, claims were required to be presented.

The provision of Sec. 130 of the Act to Regulate the Estates of Deceased Persons, that it must appear to the "*satisfaction* of the administrator and the Probate Judge" that the claimant had no notice, gives to those officers no power or right to arbitrarily say they are not satisfied, and to therefore reject a claim. An affidavit of the claimant, showing to the satisfaction of a reasonable, fair, and impartial mind that he had no notice, is all that is required.

By Sec. 141 of the Act to Regulate the Estates of Deceased Persons, judgments are exempted from the provision of Sec. 131, requiring an affidavit to be attached to the claims showing that it is due, and that there have been no payments, and are no offsets.

APPEAL from the Twelfth Judicial District.

The facts are stated in the opinion.

Thompson & Glassell, for Appellant.

I. The statute, as amended, was intended to provide a remedy for creditors coming within the terms of the proviso, in Sec. 130, and is to be most liberally construed, for the purpose of carrying out such intention. (1 Kent's Com. 511; 3 Cal. 115; 4 Id. 55-158; cases cited in 3 U. S. Dig. 485.)

II. The statute directing judgments to be presented for allowance, as any other claims, imposes no forfeiture for omitting such presentation. (Act to Regulate Estates of Deceased Persons, Secs. 130-141.)

At common law, no such requirement or penalty existed.

A claim in judgment was well regarded as having been sufficiently and finally established, and its validity and good faith as being unquestionable. The statute, therefore, must be strictly construed, before it is deemed to work a forfeiture of a claim that has once been duly established in a Court of law. (1 Cal. 71.)

S. H. Dwinelle, for Respondent.

I. A judgment against a deceased person is a "claim," and a

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holder thereof a "claimant," within the meaning of the Probate Act of this State. (*Grey v Palmer*, 9 Cal. 616.)

II. The Probate Judge and administrator are, by Sec. 130 of the Probate Act (as amended in 1860) made the judges of the sufficiency of the facts contained in the claimant's affidavit, and whether or not such facts show, to their "satisfaction," that his claim was presented within the statutory period, "by reason of his being out of the State;" and their determination is final, unless abuse of their authority is shown.

III. The affidavit of plaintiff is not sufficient to justify the presentation of the claim, after the expiration of ten months. (Probate Act, Sec. 131.)

CROCKER, J. delivered the opinion of the Court—COPE, C. J. concurring.

The complaint in this case avers that on the twenty-ninth day of September, 1856, the plaintiff recovered a judgment against Phillips, since deceased, which is still unsatisfied; that after the death of Phillips the defendant was appointed administrator of his estate; that on the twelfth day of January, 1860, the administrator caused a notice to be published requiring creditors or persons having claims against the estate to present them to him within ten months from the date of the notice; that the order for publication required it to be made once a week for five weeks; that on the thirteenth day of November, 1860, the plaintiff, by his agent, presented the claim, in the form of a certified transcript of the judgment, to the administrator for allowance and approval; that the claim was disallowed; that on the twenty-second day of November, the transcript was again presented, with an affidavit of the plaintiff, setting forth that on the sixth day of June, 1858, he departed from this State, and did not return until the —— day of August, 1860; that some time in August he first learned of the death of Phillips, but was ignorant of the appointment of an administrator of his estate, and of the publication of the notice to creditors; that he had never seen any notice or publication thereof, and was not informed of it until the fifteenth of November, 1860. The complaint further states, that on the nineteenth day of Decem-

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ber, 1860, the same transcript and affidavit were presented to the County Judge for his approval, and that each presentation of the claim was made before any decree of distribution was entered. By the indorsements on the papers presented, it appears that the claim was rejected "on account of the limitation of time of presentation." The defendant demurred to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action, and that it was ambiguous and uncertain. The demurrer was sustained, and final judgment rendered in favor of the defendant, from which the plaintiff appeals to this Court.

By the amendatory Act of February 7th, 1860, Sec. 130, of the act regulating the settlement of the estates of deceased persons, is amended so as to read as follows: "Sec. 130. If a claim be not presented within ten months after the first publication of the notice, it shall be barred forever; *provided*, if it be not then due, or if it be contingent, it may be presented within ten months after it shall become due or absolute; and *provided*, further, that when it shall be made to appear, by the affidavit of the claimant, to the satisfaction of the executor or administrator and the Probate Judge, that the claimant had no notice as provided in this act, by reason of being out of the State, it may be presented any time before a decree of distribution is entered." The last proviso is added to the section by the Act of 1860.

This is a remedial statute, and it must therefore be construed liberally, and when the meaning is doubtful, it must be so construed as to extend the remedy. (*Martin White v. The Mary Ann*, 6 Cal. 462; Sedgwick on Stat. and Const. Law, 359-361.) In construing statutes we must consider the sections together, and that interpretation should be placed upon the language which will give the particular section utility and effect, and which, at least, will make it compatible with common sense and the plainest dictates of justice. (*Burnham v. Hays*, 3 Cal. 119.)

It was the evident intent of the Legislature, in thus amending the law, to provide that a claim against an estate of a deceased person might be presented to the administrator and Probate Judge at any time before a decree of distribution is entered; *provided*, that the claimant "had no notice as provided in this act," by

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reason of being out of the State, and that the proof of this want of notice should be the affidavit of the claimant. The notice as provided in the act, was the publication under the order of the Court. In this case, the notice was ordered to be published once a week for five weeks, and the publication commenced on the twelfth day of January, 1860, and during the whole time of the publication the plaintiff was out of the State. It comes clearly within the provisions of the statute, and under it, the plaintiff had the whole time up to the decree of distribution in which to present his claim for allowance. The fact that he returned to the State before the ten months expired can make no difference, for the law had extended the time for presenting his claim, he being absent from the State, during the time of publication. The law will not presume that immediately upon his return he had notice of a publication in a newspaper months before, and if he had had actual notice of the fact of publication, he had only to look at the law, when he would find that the time was extended in his case.

It is urged that as the statute requires that it must appear "to the *satisfaction* of the executor and administrator and the Probate Judge" that the claimant had no notice, therefore their action is final and conclusive. But this gives them no power or right to arbitrarily say they are not satisfied and therefore reject the claim. The affidavit must show to the satisfaction of a reasonable, fair, and impartial mind, that the claimant had no notice, and that is all that is required. Besides, in this case, the Probate Judge rejected the claim, because it had been rejected by the administrator, and the administrator, in his indorsement of rejection, does not set up that the affidavit was not "satisfactory." And, if he had done so, he would have had no just ground for asserting it.

It is further urged that there was no affidavit attached to the claim, showing that the amount was justly due, that no payments had been made thereon, and that there were no offsets to the same, as required by Sec. 131 of the act. In making this point, counsel has overlooked Sec. 141, which provides that in the case of a judgment, no such affidavit shall be required.

The judgment is reversed, and the cause remanded for further proceedings.

HEINLIN v. CASTRO *et al.*

AFTER an action has been tried and submitted the plaintiff has no right to dismiss it, nor has the Court then any authority to enter an order of dismissal without the consent of the defendant.

In an action tried by the Court without a jury, the parties, at the September Term, introduced their proofs and submitted the case, which was taken under advisement by the Court. On the first day of the succeeding term, and before the decision was rendered, the plaintiff moved, *ex parte*, for a dismissal without prejudice, which was granted; subsequently, at the same term, on motion of defendants, the order of dismissal was vacated and a finding filed in favor of defendants upon which judgment was entered: *held*, that the order dismissing the action was unauthorized, and that the subsequent order vacating the dismissal was therefore proper.

Where an action upon a promissory note is barred by the Statute of Limitations, the remedy upon a mortgage given to secure it is also barred.

McCarthy v. White (21 Cal. 495) affirmed on this point.

A part payment, indorsed upon a promissory note, whether made before or after the expiration of the period fixed by the Statute of Limitations, does not avoid the bar of the statute.

To take a contract out of the statute there must be an acknowledgment or new promise "contained in some writing signed by the party to be charged thereby."

APPEAL from the Third Judicial District.

This action was commenced October 24th, 1860, by John Heinlin, against Juan José Castro and Petro Benal de Castro, to recover the amount of a promissory note, made by defendants to plaintiff, for six hundred dollars, dated January 25th, 1855, and payable twelve months from date with interest; and also to foreclose a mortgage, made to secure the note and bearing the same date. The answer set up as a defense the Statute of Limitations.

A trial was had at the September Term, 1861, before the Court without a jury, and both parties having closed their evidence and submitted the case, the Court held it under advisement until the next term. On the first day of the succeeding (January) term, the plaintiff, neither defendants nor their counsel being present, moved to dismiss the action without prejudice, which motion was granted and an order to that effect entered. Four days afterwards, defendants appeared by counsel and moved to vacate the order of dismissal on the ground that its entry was unauthorized by law, and

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after argument the Court granted the motion and entered an order setting aside the previous order of dismissal; after which a finding in favor of defendants was filed, and judgment entered accordingly.

The Court found as a fact that one Magin Castro, a son of defendants, paid to plaintiff on the tenth day of June, 1857, the sum of four hundred and seventy-five dollars, and also on the fourth day of July, 1857, the further sum of three hundred dollars; that both these payments were indorsed on the note, but that they were made by Magin without the authority, knowledge, or consent of his parents, the defendants. The evidence as to Magin's authority was conflicting.

Plaintiff moved for a new trial, which was denied, and from this order and the judgment he appeals.

S. Archer, for Appellant.

John H. Saunders and *Wm. Mathews*, for Respondents, cited *Lord v. Morris* (18 Cal. 482), and *Fairbanks v. Dawson* (9 Id. 891).

CROCKER, J. delivered the opinion of the Court—COPE, C. J. and NORTON, J. concurring.

This is an action to enforce the collection of a note executed by the defendants for the sum of six hundred dollars, dated January 25th, 1855, payable twelve months after date, and to foreclose a mortgage executed by the defendants to secure the payment of the note. The complaint was filed October 24th, 1860. The answer sets up the Statute of Limitations in defense. On the sixth day of September, 1861, the cause was tried, the evidence heard, and the case taken under advisement. On the sixth day of January, 1862, the Court, on the plaintiff's motion, ordered that the suit be dismissed, and that the plaintiff be allowed to withdraw the note and mortgage. On the tenth day of January, 1862, the Court set aside the order made on the sixth, and rendered its decision and findings in favor of the defendants. Judgment was entered in their favor for costs, and the plaintiff appeals to this Court.

His first assignment of error is, that the Court erred in setting aside the order dismissing the action, and rendering final judgment

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after the entry of the order of dismissal. This point is not well taken. The right to dismiss an action is regulated by Sec. 148 of the Practice Act, which authorizes the plaintiff to dismiss the action "at any time before trial, upon the payment of costs, if a counter claim has not been made." The order dismissing the action was not authorized by any of the provisions of the Practice Act; it was therefore invalid, and the Court committed no error in setting it aside. The action had been tried, submitted, and taken under advisement by the Court. The plaintiff, therefore, had no right to dismiss it on his own motion. No written consent to the order of dismission appears to have been made by the defendants, nor do they appear to have consented to it in any way.

The next assignment of error is, that the finding of the Court that no payment was made on the note by defendants was against the evidence. The plaintiff, to avoid the Statute of Limitations, states, in his complaint, that the defendants paid on the note the sum of four hundred and seventy-five dollars on the tenth day of June, 1857, and on the fourth day of July, 1857, the further sum of three hundred dollars, which were indorsed on the note. The Court finds that these payments were made by one Magin Castro, a son of the defendants, without their authority, knowledge, or consent, and the weight of the evidence seems to be in favor of the finding. But this finding is not material to the main point in the case, which is whether the action is barred by the Statute of Limitations. This question has been fully settled by numerous decisions of this Court, in which it has been held that a mortgage is barred equally with the note by the statute, and that a mere payment on the note, made after it is so barred, will not avoid the statute. There must be an acknowledgment of the debt, or new promise to pay it, "contained in some writing signed by the party to be charged thereby," to take the case out of the statute. (*Lord v. Morris*, 18 Cal. 482; *Pena v. Vance*, 21 Id. 142; *McCarthy v. White*, Id. 496.)

The alleged payments in this case were made *before* the debt had been barred by the statute, and in such case it has been held by this Court that the payment does not avoid the statute. (*Fairbanks v. Dawson*, 9 Cal. 89.)

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In *Barron v. Kennedy* (17 Cal. 574) it was held, that the debt was not barred by the statute, because the payments were accompanied by letters, which brought the acknowledgment, by the payments, within the rule laid down in the thirty-first section of the Statute of Limitations.

Judgment affirmed.

MALONE v. PLATO.

In order that a verbal contract for the purchase of goods or chattels at a price exceeding two hundred dollars may be saved from the operation of the Statute of Frauds by a delivery, there must be a transfer of possession evidenced by acts, and not by words merely.

Where, after an alleged verbal agreement for the sale of a pair of horses, they remained in the seller's livery stable, where they had been previously kept: *held*, that proof of a direction by the purchaser to the seller to keep the horses in the stable for him, or of any other language of that import, was insufficient to show such a delivery as is required by the thirteenth section of the Statute of Frauds.

APPEAL from the Sixth Judicial District.

The plaintiff seeks to recover in this action \$2,200, as the price of a span of horses, which he alleges were purchased of him by defendant.

The defendant, in addition to a denial of any contract of purchase, claims that any agreement which may have been made was void by the Statute of Frauds. The proof showed that the horses were kept by plaintiff in his livery stable at Sacramento; that some negotiations as to a purchase were made, resulting in an understanding that defendant should take the horses at the price of \$2,200, provided that upon trial they made a certain rate of speed, and that plaintiff and defendant rode out together to the place of trial and returned with the team, the plaintiff driving, to the stable. One of the witnesses testified that upon entering the stable on their return, plaintiff asked defendant what he should do with the horses, and defendant said: "Put them in the stable; do not let them; I will take them; I will be back in half an hour and pay for them."

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No agreement or memorandum in writing was made. The horses were put up in the stable belonging to plaintiff, where they had been previously kept, and within a half hour after the conversation stated, defendant sent word that he would not take them. The jury found for defendant, who had judgment accordingly. Plaintiff moved for a new trial, which was denied, and from this order and the judgment he appeals.

Coffroth & Spalding, for Appellants.

The rule is well settled, that any act of either party assented to by the other, which implies a change of ownership, is a sufficient constructive delivery, under the Statute of Frauds. (*Elmore v. Stone*, 1 Taunt. 458; *Manton v. Moore*, 7 Term, 67; *Chaplin v. Rodgers*, 1 East. 194; *Potter v. Washburne*, 13 Vt. 558; *Wing v. Clark*, 24 Me. 366; *Handlette v. Tallman*, 14 Id. 400; *Smith v. Nevitt*, Walk. 370; *Shindler v. Houston*, 1 Denio, 48.)

Geo. R. Moore, for Respondent.

There was no sufficient delivery to take the alleged agreement from the operation of the thirteenth section of the Statute of Frauds. (*Guidett v. Belknap*, 1 Cal. 399; *Shindler v. Houston*, 1 Com. 261; *Bailey v. Ogdens*, 3 Johns. 417; *Outwater v. Dodge*, 6 Men. 400; *Kent v. Hutchinson*, 3 Bos. & Pul. 233.)

NORTON, J. delivered the opinion of the Court—COPE, C. J. concurring.

In the case of *Elmore v. Stone* (1 Taunt. 458), after the sale had been agreed upon, the purchaser requested the seller to keep the horse for him on livery, as he, the purchaser, had no stable. The seller thereupon removed the horse from his sale stable, where he had been previously kept, and put him in his livery stable. This was held a sufficient delivery. The case has been treated as of doubtful authority, and when referred to has been sustained only upon the ground that the seller, by an unequivocal act, done at the request of the purchaser, had changed his possession of the horse from that of an owner to that of a livery stable keeper. It appears to be entirely settled that to comply with the requirements of the

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Statute of Frauds the transfer of the possession must be evidenced by acts, and cannot be effected by mere words. If the delivery may be constructive instead of the actual change of location of the body of the property sold, when it is bulky, yet it must be shown by some unequivocal act. (*Tempest v. Fitzgerald*, 3 Bar. & Ald. 680; *Carter v. Toussaint*, 5 Id. 855; *Shindler v. Houston*, 1 Com. 261.)

In the present case no act was done by either party indicating any change in the character of the possession by which the plaintiff held the horses.

In allowing the jury to decide, from the proofs given in this case, whether or not the parties understood that the horses were to be deemed delivered, the Court below gave the plaintiff a chance for a verdict, which, if obtained, it would have been difficult under the authorities to sustain, and upon the question thus submitted to the jury the evidence was such as to preclude this Court from disturbing the verdict.

The judgment is affirmed.

PIOCHE v. PAUL *et al.*

No WELL considered decision of this Court ought to be overruled unless it clearly violates some established rule of law, and great evils are likely to flow from suffering it to stand as a rule of property. It is an additional reason for standing by a decision that it was based upon the construction of a statute and affects titles to real estate.

Lathrop v. Mills (19 Cal. 513), deciding that the Statute of March 26th, 1856, limiting the time for commencing actions by a patentee was, in this respect unconstitutional, affirmed on the principle of *stare decisis*.

In an action of ejectment one of several defendants, who in his answer disclaims all right, title, and interest in the premises, but also denies all the allegations of the complaint, and avers that "he was and still is lawfully seized and in possession" of the land claimed, is a proper party, and is not entitled to have the action dismissed as to himself.

Where the plaintiff in ejectment derives title from a United States patent issued upon confirmation of a Spanish or Mexican grant, the defendant will not be permitted to introduce proof of the invalidity of the grant for the purpose of impeaching the patent.

Pending proceedings to obtain confirmation of a Mexican grant the claimants

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conveyed the land to H. and took back a mortgage to secure the purchase money, and afterwards commenced an action to foreclose the mortgage, and before decree assigned the same to M. At the sale under the decree the claimants bid off the property and in due course obtained the Sheriff's deed, and subsequently, upon confirmation of the claim, a patent. In an action of ejectment by a grantee of the patentees against P., the defendant objected that by the transaction above stated the patentees had parted with the title, and that plaintiff took nothing by his conveyance from them: *held*, that the title conveyed by the patentees to H. was revested in them by the Sheriff's deed, and that any equitable rights of M. in the premises afforded defendant no ground for impeaching that deed in this action.

APPEAL from the Twelfth Judicial District.

The facts are stated in the opinion.

W. A. Cornwall, for Appellant.

I. The action was barred by the Limitation Act of March 26th, 1856. The decision of this Court in *Lathrop v. Mills* (19 Cal. 518) is not law and should be overruled. We respectfully ask this Court to review that decision, and we refer to the arguments presented in favor of the respondents in that case, one of which was, that the eleventh section of the act in question was recognized by this Court in *Morton v. Folger* (15 Cal. 284)—Justice FIELD delivering the opinion—as a legal and valid exercise of sovereign power by the State through its Legislature.

II. The defendant James Paul disclaimed any interest in the subject of the action, and the referee therefore erred in denying the motion to dismiss as to him, and erred in rendering a judgment against him for damages.

III. The City or Pueblo of San Francisco is now presenting her claim to four square leagues of land in the District Court of the United States for the Northern District of California, and it is anticipated that the claim will be confirmed and that a patent will be issued by the United States. This Court held in *Hart v. Burnett* that the grant to the pueblo was made at a date long prior to the date of the pretended Bernal grant, under which the plaintiff claims to recover in this action, and the whole of the so-called Bernal grant being included within the four square leagues granted to the pueblo, we ask what will be the effect of the issue of a patent

to the pueblo for the whole of her claim. As the senior grantee it must, doubtless, place her in a position to contest the Bernal patent, which does not affect third persons but is conclusive between the United States and the patentees only.

We claim in this action that Horatio Paul, as the grantee of the pueblo of the premises in dispute, is a "third person" within the meaning of the Act of Congress of 1851; that he has such a standing in Court as elevates him above the character of a mere trespasser, and enables him to attack the patent collaterally upon the ground of fraud or otherwise. We claim also that if the pueblo, as the senior grantee of the land, may be permitted to prove that the so-called Bernal grant is a forgery beyond question, and that her title is the paramount title, then the referee erred in this action in refusing to permit the defendant Horatio Paul to prove that the Bernal grant, under which this plaintiff claims, is a forgery.

In *Waterman v. Smith* (13 Cal. 419) this Court say that "the patent is conclusive evidence of the right of the patentee to the land described therein." That was a case where both parties claimed the same land under two distinct grants from the Mexican Government. Now, if two distinct patents for the same land should be issued to different parties, as in *Jackson v. Lawton* (10 Johns. 24), which patent would be conclusive evidence of the right of the patentee to the land?

We think the doctrine of *Waterman v. Smith*, if it is intended to apply to patents issued by the United States to private individuals for pueblo lands, is inconsistent with the sixth proposition affirmed by this Court, in *Hart v. Burnett*, in the following words: "Sixth, that this property and these trusts were public and municipal in their nature, and were within the control and supervision of the State sovereignty, and that the Federal Government had no such control or supervision."

IV. The plaintiff shows no conveyance or assignment from Samuel Moss, Jr.; he was the *bona fide* owner of the mortgage made by Hutchinson, and the owner of the judgment obtained against the mortgagor. The sale of the premises to the Bernals, as the judgment creditors, was therefore void. The assignment of

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the mortgage and judgment to Samuel Moss, Jr., was of record, and the record in this action shows that that assignment remains there in the Recorder's office uncanceled. The plaintiff in ejectment must recover upon the strength of his own title. If equity would have given the heirs at law of Samuel Moss, Jr., any relief against the Sheriff's sale of the premises to the Bernals, under the false pretense that they owned the mortgage and judgment, then the plaintiff in this action cannot recover, because he has failed to deraign title from Samuel Moss, Jr., or his heirs.

V. The deed from J. Mora Moss to the plaintiff, Pioche, dated January 2d, 1860, was not executed or acknowledged until September 12th, 1861, nearly a year after the commencement of this action. This Court has repeatedly affirmed the established rule of evidence that the plaintiff cannot recover upon a title acquired after the commencement of the action.

Whitcomb, Pringle & Felton, for Respondent.

CROCKER, J. delivered the opinion of the Court—COPE, C. J. and NORTON, J. concurring.

This is an action to recover the possession of a tract of land near the City of San Francisco. The case was tried before a referee, who reported a judgment in favor of the plaintiff. The defendants moved for a new trial, which was denied, and they appeal from the judgment and the order refusing a new trial, to this Court.

The plaintiff claimed title to the premises in controversy, under a grant from the Mexican Government to José C. Bernal, dated on the tenth day of October, 1839. Bernal died in 1850, and his heirs filed a claim under the grant, before the Board of United States Land Commissioners, which was duly confirmed by said Board, and also on appeal, by the United States District Court, and afterwards, on the thirty-first day of December, 1857, the Government of the United States, in pursuance of such decree of confirmation, issued a patent therefor to Carmen Sibrian de Bernal and José Jesus Bernal, the heirs of José C. Bernal. This action was commenced on the twenty-seventh day of December, 1860, more than two years after the date of the patent. The defendants

pleaded the two years' statute of limitations, prescribed by Sec. 11 of the Act of March 26th, 1856, and the main point in the present case is whether the decision of this Court in the case of *Lathrop v. Mills* (19 Cal. 513), in which it was held that this Sec. 11 of the Statute of March 26th, 1856, was unconstitutional and void, shall be overruled or not. The appellant contends vigorously that that decision is erroneous and should be overruled; that the referee and the Court below erred in not sustaining the validity of that section of the statute, and therefore the judgment ought to be reversed. The case of *Lathrop v. Mills* was decided at the October Term, 1861, of this Court, after a full discussion of the question by the counsel on both sides, and all the Judges of the Court united in rendering the opinion. The point involved in that case was fully considered by the Court, and a lengthy opinion was filed, giving the reasons and grounds of the decision. The power of the Legislature over the whole subject of limitation of actions was not denied. Since the rendition of that decision two sessions of the Legislature have been held, and the time for limitation of actions upon patents has not been changed, but left to be determined by the general statute of limitations, which covers the whole subject matter. That the Legislature could enact a law providing that actions for the possession of land, founded upon patents, should be brought against parties in adverse possession at the time, within two years from the date of the patent, which would be constitutional and valid, does not seem to have been doubted by the Court in that case. Yet no attempt has been made by the Legislature, since the invalidity of the Act of March 26th, 1856 was declared by this Court, to reenact the same in a form free from constitutional objections. Under these circumstances this Court is asked to review its decision in that case, and to overrule it. It is now nearly two years since that decision was rendered, and, without doubt, many suits have been deferred relying upon its being sustained, and if it should be overruled now, great injury would undoubtedly be inflicted upon many parties throughout the State who have relied upon it. Under such circumstances none but the strongest reasons would justify the Court in taking such action as is asked by the appellant. Fickleness in Courts is always to be

deprecated, but especially in matters relating to titles to real estate. Stability is required in such cases above all others. One of the greatest evils the people of this State have suffered, has been the uncertainty of its land titles, and the greater the precision and certainty of the rules of law upon the subject of titles to real estate, the more security will all classes feel in their transactions and dealings in land. Therefore, no well considered decision ought to be overruled unless it clearly violates some well established rule of law and great evils are likely to flow from suffering it to stand as a rule of property.

In the present case we have the less hesitation in refusing to overrule the decision in *Lathrop v. Mills*, because that was a construction of a statute, and in such cases it is within the power of the Legislature to prevent any evils likely to flow from the decision, and to correct any misconstruction of their intention by the Court, by enacting a proper law, expressing such intention in unmistakable terms, and free from the objections upon which the decision of the Court is founded. In this case the Legislature has had abundant opportunities, had it so desired, or had they deemed it for the interest of the people, to have enacted a law upon the subject, clear in its terms, and free from constitutional objections. But they have not done so, and we therefore do not hesitate in declining to overrule that case.

It is also insisted by the appellant that the referee erred in refusing to dismiss the action as to James Paul, one of the defendants, on the ground that in his answer he disclaims all right, title, and interest in the premises. It is true that the answer of this defendant closes with a disclaimer of this kind, but it also contains a general denial of all the allegations in the complaint, and then avers that "he was and still is lawfully seized and in possession" of the lands in controversy. It also appears that he was in possession of the land at the commencement of the action and continued in possession up to the trial. Under these circumstances his disclaimer of title was no defense to a demand for a judgment for the possession and damages for the detention of the land. He was a necessary party to the action, being in possession, and was therefore properly made a defendant with the others.

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On the trial the defendant offered to prove that the grant to Bernal was invalid on several grounds. He had previously offered in evidence the patent to Bernal's heirs from the Government. The referee refused to receive the proof, and this refusal is assigned as a ground of error. This Court has decided that a patent cannot be attacked in this manner in a collateral proceeding. (*Doll v. Meader*, 16 Cal. 324; *Mott v. Smith*, 16 Id. 548; *Yount v. Howell*, 14 Id. 467; *Boggs v. Merced Mining Co.*, Id. 363; *Natoma Water and Mining Co. v. Clarkin*, Id. 551; *Waterman v. Smith*, 13 Id. 419; *Moore v. Wilkinson*, Id. 487; *Teschmacher v. Thompson*, 18 Id. 11; *Leese v. Clark*, Id. 535; *Leese v. Clark*, 20 Id. 387.) These decisions clearly sustain the action of the referee on this point.

It is also urged that the City or Pueblo of San Francisco is now prosecuting a claim to several leagues of land, including the premises in controversy, in the District Court of the United States for the Northern District of California; that it is anticipated that the claim will be confirmed, and that a patent will be issued by the United States; that the defendants will be entitled to all the benefits of such patent, and therefore have a right to show the invalidity of the grant to Bernal and the patent to his heirs. We see no evidence in the record of any title in the City of San Francisco to the premises in controversy, or of any offer to introduce any such evidence; and this Court cannot take judicial notice of such facts, if they exist. If such evidence exists the defendants should have offered it, and then it could have been considered. If the City of San Francisco has a title to this land, superior to that derived under the grant to Bernal, and a patent shall hereafter issue under such superior title from the United States Government to the City of San Francisco, and the defendants shall obtain that title from the city, then such title may be asserted in a subsequent action, if necessary, by the defendants, against any person claiming under an inferior title. But that is not an issue presented in this suit.

It is also insisted that the plaintiff failed to prove a proper conveyance of the title from the patentees to himself. His chain of title is as follows: Deed from patentees to Harvey S. Brown, dated June 4th, 1857; deed from Harvey S. Brown to J. Mora Moss,

dated September 30th, 1858; deed from J. Mora Moss to the plaintiff, dated January 2d, 1860. The first objection is, that at the date of the deed to Brown, the patentees had no title to the premises, and that their deed, therefore, conveyed none. It seems that on the tenth day of September, 1853, the patentees conveyed the land to Josselyn Hutchinson, and took back a mortgage to secure the purchase money. They commenced an action to foreclose the mortgage, and before the decree assigned the mortgage to Samuel Moss, Jr. A decree was duly rendered foreclosing the mortgage, and at the sale under the decree the patentees bid off the property, and on the sixth day of February, 1856, they obtained a deed from the Sheriff therefor. It is asserted by the appellant that they bid off the property "as judgment creditors." We see no evidence in the record to sustain this assertion, and if there was, we do not perceive that it would make any difference. The title conveyed by them to Hutchinson, was revested in them by the Sheriff's deed of February 6th, 1856. If Samuel Moss, Jr., was in any way injured in these transactions his legal representatives can enforce his rights, in a proper action, but they afford these defendants no ground for impeaching the Sheriff's deed to the patentees.

The next objection to the plaintiff's chain of title is, that the deed from Moss to the plaintiff, though dated before the commencement of the suit, was not in fact executed and delivered until the date of the acknowledgment, which was nearly a year after the suit had been pending. The witness, Applegate, testified that although this deed was not executed until after the time it bears date, yet it "was executed and delivered a considerable time before the complaint in this action was drawn or filed." These objections to the plaintiff's title are therefore untenable.

We have thus noticed all the material points presented by the appellant, and as no error has been shown in the proceedings of the Court below, the judgment is affirmed.

BOND *et al.* v. DORN *et al.*

A NOTICE, under Sec. 422 of the Practice Act, of the intention of a party to be examined as a witness in his own behalf, need not state each particular fact, or all the evidence in full, which the party intends to state in his testimony. It is sufficient if it states the several subjects, or each particular subject matter respecting which the party is to be examined.

Thus in an action for the diversion of water, the notice for plaintiffs to testify, stated the points upon which they would be examined with about the same definiteness and particularity as is required in making issues in a pleading: *held*, that the notice was sufficient, and that the refusal to permit the plaintiffs to be examined was error, for which a new trial would be granted.

APPEAL from the Thirteenth Judicial District.

The facts are stated in the opinion.

J. G. McCullough, for Appellants.

The Court erred in excluding the plaintiffs as witnesses in their own behalf.

The notice was given under Sec. 422 of the Practice Act, as amended (Stat. 1861, 522), which requires the party to specify the points upon which he intends to be examined.

This notice does specify that plaintiffs will offer themselves to prove: 1st, that they were at the commencement of suit in the actual possession of the ditch in dispute, and were the prior possessors and owners thereof, and entitled to the use and benefit of the water; 2d, that they owned the prior right to the water flowing in Sherlock's Creek; 3d, that defendants diverted it; 4th, the damages plaintiffs have sustained by the diversion. Must the plaintiffs specify in what way they are the prior owners of the ditch and water? In what particular manner or by what means defendants diverted the water? We think not. But even if this be so, certainly the last point is sufficient, and plaintiffs should have been admitted to prove damages, as it cannot be expected that the notice must contain each item of damages, and specify each dollar of loss. None of the New York cases are analogous to this.

In 8 How. Pr. 342 plaintiff's notice was simply that he would examine his assignor "as a witness on the part of plaintiff." In 13 How. Pr. 198, notice was that plaintiff's assignor would be examined "as to defendant's liability and generally as a witness." In 15 How. Pr. 290, defendant's notice said, "that he would be examined in his own behalf on each and every allegation and fact put in issue by the pleadings."

In none of these cases are the points specified with the same particularity as in the notice in this case.

Harmon & Hartley, for Respondents.

I. The single question is as to the meaning of the phrase "specifying the points" in Sec. 422 of the Practice Act, as amended in 1861; and we contend that a notice that a party will be examined on his own behalf as to all the issues raised by the pleadings is insufficient. The notice should be as definite as is required in a bill of particulars.

An issue raised by the pleadings may involve a half dozen points, and the party is entitled to know as to which point the examination is to be directed. The points intended by the statute are the several mooted questions of fact. (*Pattison v. Johnson*, 15 How. Pr. 290, 291; *Burrill's Law Dic.* Point and Article; 4 *Chitty's General Practice*, 200, etc.) These latter authorities show that point means substantially what article means, and the form in *Chitty* shows that article refers to a particular specification of the facts. So in *Admiralty Practice*, the forms run, in the beginning of the libel: "And thereupon the said A B doth allege and articulately propound as follows, to wit;" and then comes an exact statement of all the essential facts of the case. (*Conkling's Admiralty*, 816, *et passim*.)

The statute permits a man to prove his own case; but to guard against abuse of his power, requires him to notify his opponent as to what special facts he intends to speak, that is, as to what lesser facts in the chain, going to make up the ultimate fact of the case, to wit, the issue. *Green v. Palmer* (15 Cal. 415, 416) as to distinction between three different kinds of fact. The illustration given at the bottom of page 416 is pertinent to this case.

CROCKER, J. delivered the opinion of the Court—COPE, C. J. and NORTON, J. concurring.

This is an action for damages, caused by the diversion of water. On the trial the plaintiffs were offered as witnesses on their own behalf, under a notice served on the opposite party, in compliance with the provisions of the amendment of 1861 to Sec. 422 of the Practice Act. The defendants objected, that the notice did not sufficiently specify the points on which the parties intended to be examined. The Court held the notice to be insufficient, and excluded the witnesses. The defendants recovered judgment, a motion for a new trial was made and denied, and the plaintiffs appeal from the judgment and the order refusing a new trial, and assign for error that the Court erred in refusing to permit the plaintiffs to testify.

The notice states that the plaintiffs will offer themselves as witnesses on their own behalf, "to prove that they (the plaintiffs) are at the present time, and were at the commencement of this suit and prior to that date, the owners and proprietors, and were in the actual possession of the water ditch described in the plaintiffs' complaint, and are at the present time and were entitled to the use and benefit of the water for mining purposes, flowing in the natural channel of Sherlock's Creek, about one and one-half miles above its junction with the Merced River, at the commencement of this suit, and that the defendants wrongfully and unlawfully diverted and conveyed away the water flowing in the natural channel of the said Sherlock's Creek, above the mouth of the plaintiffs' water ditch aforesaid, as alleged in the plaintiffs' complaint." Also, "to prove their prior rights to the water flowing in the natural channel of the said Sherlock's Creek, and also the amount of damages they have sustained in consequence of the defendants wrongfully and unlawfully diverting and conveying away the water flowing in the natural channel of the said Sherlock's Creek, above the mouth of the plaintiffs' water ditch aforesaid." We think the notice in this case sufficiently specifies the "points" on which the party intends to be examined. It is not necessary to state each particular fact, or all the evidence in full which he intends to state in his testimony. It is sufficient if the notice states the several subjects, or each

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particular subject matter, respecting which he intends to testify, and the notice in this case does so with sufficient clearness and particularity.

The judgment is reversed, and the cause remanded for further proceedings.

CORMERAIS *et al.* v. GENELLA.

A POWER of sale contained in a mortgage is a merely cumulative remedy, and does not affect the right to foreclose in chancery.

G., to secure the payment of his three promissory notes, made severally to C., F., and S., executed an instrument whereby he conveyed to C. certain real estate upon the condition that if he, G., should pay the notes according to their tenor, the conveyance should be void; but providing that if default should be made in the payment, then it should be lawful for C., after notice, to enter upon and sell the premises and apply the proceeds to the payment, which sale should be a bar both in law and equity against G. and his representatives: *held*, that this instrument was a mortgage with an ordinary power of sale, and not a trust deed, and that its character as a mortgage was in no respect changed because the mortgagee was a trustee for himself and other parties.

Where a mortgage contains a power of sale, the mortgagee has his election either to foreclose in chancery and obtain a judicial sale, or to sell under the power.

Whether a right of redemption exists after a sale under a power contained in a mortgage—*Query?*

In an action to foreclose a mortgage under our statute, as well since the amendments of 1860 and 1861 as before, a personal judgment for the debt secured may be entered in connection with a decree directing a foreclosure and sale. This judgment cannot, however, be docketed, or become a lien on other property, or authorize the issuance of an execution until after the sale is made and the proceeds applied *pro tanto* to its satisfaction.

APPEAL from the Fourth Judicial District.

The action was upon an instrument executed by the appellant, Joseph Genella, to the respondent Henry Cormerais, and was commenced August 6th, 1861. The appeal is upon the pleadings and the judgment. The complaint, so far as it bears upon the questions raised, shows: That April 2d, 1855, the defendant, appellant, Genella, being indebted to French, Wells & Co., of which firm the plaintiffs, respondents French & Wells, are the surviving partners, in \$10,000; to the plaintiffs the Boston and Sandwich Glass Co.,

in \$15,000; and to the plaintiffs Jarvis & Cormerais, in \$15,000, made and delivered to them respectively his promissory notes for the said amounts respectively, payable in twelve months from date, and in order to secure the payment thereof, according to their tenor, agreed with the said Boston and Sandwich Glass Co., French, Wells & Co., and J. D. Jarvis & Cormerais, to convey the premises hereinafter mentioned to said Cormerais, as trustee for and on behalf of the said parties, and made and delivered, at or about the same time, to said Cormerais (one of the firm of Jarvis & Cormerais) his indenture of mortgage upon a certain lot of land in San Francisco, whereby, after reciting his indebtedness upon the notes, and his said agreement to convey the premises to said Cormerais, as trustee for and on behalf of said French, Wells & Co., the Boston and Sandwich Glass Co., and Jarvis & Cormerais, he bargained, sold, etc., the premises to said Cormerais: with the proviso, however, and upon the express condition, that if he should pay the said several sums of money when they became due, according to the true intent and meaning of the said notes, then said indenture of mortgage should be void; and if default should be made in the payment of the said sums of money, or either of them, or of the interest, etc., then it should be lawful for the said Cormerais, his executors, administrators, or assigns, upon four months' notice of his or their intention so to do, to enter into and upon, all and singular, the said mortgaged premises, and to sell and dispose of the same, and all benefit and equity of redemption of said Genella, his heirs, executors, administrators, or assigns therein, at public auction, according to law; and out of the money arising from such sale, to retain the principal and interest which should then be due on the said promissory notes, with the costs and charges of advertising and sale, rendering the overplus of the purchase money, if any, to said Genella, his heirs, etc.; which sale so to be made, should forever be a perpetual bar, both in law and equity, against said Genella, his heirs and assigns, and all other persons claiming or to claim the said premises by, from, or under him or them, or any of them, etc.

That up to June 16th, 1858, Genella had paid on account of the interest, \$4,756 48, leaving still due the principal sums amounting to \$40,000, besides a large arrear of interest. That

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prior to that time, Cormerais gave to Genella the four months' notice specified in the mortgage, and on that day he and Genella entered into a written agreement (set forth at large in the complaint), reciting that whereas Genella had given to Cormerais a certain mortgage, which was recorded, etc., and the conditions of the mortgage had been broken by the non-payment of the moneys therein specified, and Cormerais had given the four months' notice, etc., and Genella had agreed that if Cormerais would suspend and postpone the sale, Genella would pay the mortgage debt in installments of \$5,000 each every six months; therefore they agreed, the said Cormerais to suspend and postpone the sale from six months to six months, so long as the installments should be regularly paid, and Genella to pay said mortgage debt in installments of \$5,000 at the times specified; and if he should fail to pay any one, that Cormerais might proceed to sell said mortgaged premises, at public auction, as in said mortgage deed is provided. That Genella paid the first installment, but failed to pay any other, or any money upon said notes, or either of them, leaving due the whole of the principal sums and a large arrear of interest; concluding with the usual prayer.

Genella demurred to the complaint on the grounds: 1st. Of misjoinder of parties plaintiff. 2d. Of improper union of several causes of action. 3d. No cause of action, and 4th. Ambiguity and uncertainty. His demurrer was overruled by the Court, and he answered, setting up two defenses; on both of which the Court found against him on the proof upon the trial, and the plaintiff had judgment.

The judgment was in the usual form for a foreclosure sale, with provision for a surplus or deficiency. The amount due to each of the several plaintiffs was separately liquidated. This part of the judgment furnishes one of the points of counsel for appellants, and is in these words: "It is ordered, adjudged, and decreed, that the plaintiffs, Abram French and John T. Wells, have and recover of and from the defendant, Joseph Genella, the sum of \$12,554 95, with interest thereon at the rate of seven per cent. per annum from the date hereof; the plaintiffs The Boston and Sandwich Glass Company, have and recover of and from the defendant, Joseph

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Genella, the sum of \$18,347 65, with interest, etc.; and the plaintiffs Deming Jarves and Henry Cormerais, have and recover of and from the defendant, Joseph Genella, the sum of \$18,879 84, with interest," etc.

From this decree the defendant appeals.

Selden S. Wright, A. A. Cohen, and L. Aldrich, for Appellant.

I. The demurrer to the complaint should have been sustained by the District Court, because the instrument sued on is not a mortgage.

The difference in the respective rights of parties making or claiming under a deed of trust, as distinguished from a mortgage, is clearly stated by the learned Chief Justice, in *Koch v. Briggs* (14 Cal. 256). The only difference between that case and this is that here the trustee is also a creditor. The rights and remedies of the other parties plaintiff are identical with the rights and remedies of the creditors in *Koch v. Briggs*, and the rights of Genella are the same as those of the grantor in that case, and the rights, powers, and duties of Cormerais the same as those of the trustee. Can the fact that he was a member of a firm which was also a creditor and one of the plaintiffs make such a difference in the rights of all the rest?

Cormerais has voluntarily taken upon himself the character of trustee for the other parties plaintiff, and he must fulfill his duty to them in accordance with the contract, even if to do so shall be in conflict with his own interests. Admit that the instrument, so far as Cormerais is concerned, is a mortgage. Yet it is a mortgage with a power to sell, and when that power is executed the equity of redemption is gone. The validity of such a provision is not now questioned anywhere. (1 Washburn on Real Property, 498.)

And although in such cases as suggested by the Chief Justice, in the case above cited, the mortgagor would ordinarily still have the right to invoke the aid of a Court of Equity, yet he clearly would not be allowed to do so if such course would interfere with the rights of other parties interested in the instrument.

If this right to sell had not been so clear, and the instrument should be held a mortgage as to Cormerais, and a deed of trust as

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to the other parties plaintiff, then Cormerais might have had the right to file his bill as sole plaintiff, and the other plaintiffs might have been made defendants in this suit. Then, under this view, there is a misjoinder of parties plaintiffs and defendants, and that cause of demurrer should have been sustained.

But the necessity for such a bill could not possibly arise, as the trustee was clothed with full power to sell, and it was the contract of the parties that in default he should sell, and the mode of executing the trust was clearly prescribed. If a mortgage contains a power to sell, neither legal or equitable proceedings are necessary to enforce it. (*Bloom v. Van Ranseler*, 15 Illinois; *Fogarty v. Lawyer*, 17 Cal. 443.)

A deed of trust differs both from a mortgage and a conditional sale. The distinction between the two former conveyances, which seems now to be well settled, is this: It is the essence of a mortgage that it is a security for a debt which the grantor or obligor remains under a legal obligation to pay, and when no such obligation exists an agreement to reconvey will not be a mortgage but a mere privilege to repurchase. But if the defeasance be executed to the grantor and a stranger, then the instrument is no longer a mortgage but a conditional sale. (1 Washburn on Real Property, 495; *Low v. Henry*, 9 Cal. 538.)

If the mere naming of a stranger as one of the defeasors stamp the instrument with the character of conditional sale instead of a mortgage, much more so would the fact that nearly all of the *cestuis que trust* were not concerned with the legal title stamp the instrument now under review with the character of a deed of trust.

II. The Statute of 1861 (Prac. Act, Sec. 246) under which the judgment in this case is claimed to have been entered, prescribes the form of judgment which "the Court shall have power to render," and as the judgment here is not such as the section provides for, it is undoubtedly erroneous. This form of judgment was good under the old practice, but under the amended Act of 1861 cannot now be taken. It will not do to say that this form of judgment was intended as a finding of the amount due to the plaintiffs. Both the decree and judgment contain an elaborate and detailed statement of the amount found to be due to the plaintiffs, and after

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that in each instrument follows a judgment for money in the ordinary common law form. Such a judgment is not only not warranted by our statute, but is forbidden. The proceeding of foreclosure in this State being regulated by statute, its requirements should be strictly pursued. The plaintiffs had their choice either to file a bill for foreclosure of the mortgage or to bring an action of assumpsit on the notes, and having elected to foreclose they cannot in such proceeding take a judgment uniting the relief proper to both actions.

Eugene Casterly, for Respondents.

I. The deed of April 17th, 1855, from the appellant, Genella, to the respondent Cormerais, is a mortgage with all the essential features of one, and it is not a conveyance of the legal title in fee upon trust as contended by the appellant. In this State a mortgage of land, whatever its form, is in its effect a contract simply for a specific lien or charge upon a particular parcel of land, unaccompanied by any right of possession or other estate therein, by way of security for the performance of some agreement, generally to pay money. (*McMillan v. Richards*, 9 Cal. 409-411; *Goodenow v. Ewer*, 16 Id. 406-408; *Kortright v. Cady*, 21 N. Y. 347, 365; *Power v. Lester*, 23 Id. 533.)

The deed in this case answers perfectly to these essential and distinctive conditions of a mortgage. Speaking in the ordinary language of the law of mortgages, the instrument is a conveyance defeasible on condition with a right in equity of redemption in the grantor on the one hand, and of foreclosure in the grantee upon the other—these two rights being mutual and reciprocal. This is, by all the authorities, the distinctive test of a mortgage. (*Koch v. Briggs*, 14 Cal. 262; *Sampson v. Pattison*, 1 Hare, *535, 536.)

The position of appellant's counsel that the instrument is not a mortgage, but a conveyance of the legal title in fee to the respondent Cormerais, in trust to sell to pay the debt of Genella, cannot be maintained. There is no similarity, or even analogy, between a mortgage and such a conveyance in point of legal effect and operation, especially in this State. In the case of a mortgage no estate or interest in the land passes out of the mortgagor into the mort-

gagee, except the mere right in the latter to hold a specific lien or charge upon the land, and in a certain contingency to have the land applied, by means of a sale, in equity in satisfaction of his lien. In all other respects the title of the mortgagor to his land is wholly unaffected by the mortgage, and continues precisely the same after it is made as it was before. In the case of a conveyance, such as is claimed to have been made here by the appellant, the entire legal title passes out of the grantor into the grantee, and vests in the latter absolutely, subject only to the purposes of the trust, with all the incidents of title, such as the right to the possession of the premises, the rents and profits, etc. The grantor of such a conveyance has no equity of redemption left in him, and the grantee has no right of foreclosure, for the best of all possible reasons, that there is nothing to foreclose. Each instrument may have the same general object, namely, to secure the payment of a sum of money. But this is a mere accidental resemblance, not in the slightest degree affecting or modifying the essential difference between the instruments, or between their effect and operation in law.

That Cormerais, the grantee of the mortgage, is described as "trustee," does not render the instrument any the less a mortgage. A man may be the trustee of a mortgage, as well as of the legal title in fee. Instances are not uncommon in the books, in which a mortgage is made to one, for the benefit of several sets of creditors. (*Davis v. Hemmingway*, 29 Vt. 438; *Wood v. Williams*, 4 Madd. top 101, *184; *Lowe v. Morgan*, 1 Bro. Ch. *368.)

So, the power of sale granted in a mortgage does not affect the question. Such a power is according to the form of a mortgage in use in this and other States, and does not in any respect interfere with the right of the mortgagee to have a foreclosure and sale. (1 Wash. Real Prop. 501, Sec. 8; *Cox v. Wheeler*, 7 Paige, 249; *McGowan v. Branch Bank*, 7 Ala. 528; *Carradine v. O'Connor*, 21 Id. 573; and see *Jenkins v. Rowe*, 11 E. L. & E. 299; *Sampson v. Pattison*, 1 Hare, *536.)

II. The form of the decree is proper. *Chapin v. Broder* (16 Cal. 403) seems to settle the question. The decision there is, that until after the balance remaining due upon the sale of the mortgaged premises has been ascertained, the personal judgment against

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the mortgagor cannot be docketed, so as to give a lien upon his other real property. Clearly, the amendment of 1861 (Laws of 1861, 306, 307) has simply embodied in a statutory enactment the principle of this decision. The language of the act is: "If it shall appear, etc., that there is a deficiency, etc., and a balance still due, etc., the judgment shall then be docketed for such balance against the defendant," etc.

It is "the judgment" which is docketed for the balance, not "a judgment;" showing very plainly that the effect of the amendment is, not to forbid the rendition in the decree of "the judgment" against the mortgagor for the mortgage debt as before, but only the docketing of it, so as to give a lien, until after the balance due shall have been ascertained.

CROCKER, J. delivered the opinion of the Court—COPE, C. J. and NORTON, J. concurring.

This action was brought in the District Court to foreclose an instrument claimed to be a mortgage. The plaintiffs recovered judgment, and the defendant appeals to this Court.

The first ground of error is that the complaint does not state facts sufficient to constitute a cause of action, and therefore the Court below erred in overruling the demurrer filed by the defendant setting up that ground. Upon this point the defendant contends that the instrument sued on is not a mortgage, but a conveyance of the fee in trust, and that therefore this action cannot be maintained to enforce it.

The complaint sets forth that the defendant executed to French, Wells & Co. his note for \$10,000; to the Boston and Sandwich Glass Company for \$15,000, and to Jarvis & Cormerais for \$15,000, and to secure the payment of said notes, he executed to said Cormerais a mortgage whereby he granted, bargained, sold, aliened, released, conveyed, and confirmed to the said Cormerais, his heirs and assigns, certain property therein described, with the proviso, however, and upon the express condition that if the said Genella should well and truly pay said notes and the interest thereon, then the said indenture of mortgage should be void, and if default should be made in the payment of the same, then it should be lawful for

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the said Cormerais, his executors, administrators, or assigns, upon four months' notice of his or their intention so to do, to enter upon the mortgaged premises and to sell and dispose of the same, and all benefit and equity of redemption of said Genella, his heirs, executors, administrators or assigns therein, at public auction, according to law, and out of the proceeds of the sale to retain the principal and interest then due on the notes, with the costs of the sale, rendering the overplus, if any, to said Genella; which sale so to be made should forever be a perpetual bar both in law and in equity against said Genella, his heirs and assigns, and all other persons claiming or to claim the said premises under him or them. This is clearly a mortgage, with an ordinary power of sale—an instrument in common use in many States, especially those having special laws, regulating the mode and manner of conducting sales under them. It has all the usual conditions and provisions of a common mortgage, with the addition thereto of a power of sale vested in the mortgagee. It differs entirely from the class of instruments known as trust deeds, one of which was the subject of litigation in *Koch v. Briggs* (14 Cal. 262.) The provision respecting a sale by the mortgagee is not mandatory or exclusive in its character. It provides merely that if default be made it shall be lawful for the mortgagee to sell the mortgaged premises at public auction, according to law, the latter clause evidently copied from some form in use in a State having laws regulating such sales. In this State we have no such special statute, and it may be doubtful, perhaps, whether under this provision, any sale of the property could be made, "according to law," except a regular judicial sale, under a decree of foreclosure rendered by some competent Court. It is clear that there is nothing in the instrument forbidding a sale under a judicial decree; and the mortgagee has his election to foreclose in that way or under the power of sale vested in him by the mortgage. It is decidedly for the benefit of all parties that the mortgage should be foreclosed in the former mode rather than the latter. In that way there is no doubt of the right of the mortgagor, or parties holding under him, to redeem the property within six months after the sale, as provided by the statute. If the latter mode should be adopted, a doubt might arise whether such right of redemption

existed. We have never heard it doubted before that Courts of Equity have the power to foreclose mortgages with powers of sale, nor has the able counsel for the appellant referred us to a case in which the right to foreclose such an instrument in a Court of competent jurisdiction has been denied. The power of sale contained in the mortgage is a mere cumulative remedy, and does not in the least affect the right to foreclose in chancery. (Washburn on Real Prop. 501, Sec. 8; *Carradine v. O'Connor*, 21 Ala. 573; *McGowan v. The Branch Bank of Mobile*, 7 Id. 823; *Cox v. Wheeler*, 7 Paige, 248.)

It does not in the least change the character of the instrument as a mortgage, because the mortgagee is a trustee for himself and other parties. (*Davis v. Hemmingway*, 29 Vermont, 438; *Lowe v. Morgan*, 1 Brown's Ch. 368; *Wood v. Williams*, 1 Madd. Ch. 185.)

The second point made by the appellant is, that the Court erred in rendering personal money judgments in favor of each of the parties holding the notes against the defendant, before the sale of the property. He insists that this cannot be done under Sec. 246 of the Practice Act as amended in 1861. (Stat. of 1861, 306.) Respondent, in his brief, refers to the case of *Chapin v. Broder* (16 Cal. 403, 422) as an exposition of this statute, but that was a decision upon a judgment rendered before this section was amended by the acts of 1860 and 1861, and therefore has no application to the present case. Counsel for appellant admits that the judgment in this case would be good under this section of the Practice Act, as it stood before the amendments of 1860 and 1861, but contends that the amendment of 1861 has taken away the power of the Court to render a personal money judgment until *after* the sale of the property, and the application of the proceeds of the sale to the debt. As this amendment relates to the remedy given to parties, it should be liberally construed to extend the remedy. (*White v. The Mary Ann*, 6 Cal. 470; *Burnham v. Hays*, 3 Id. 119.) The amendment first provides that "there shall be but one action for the recovery of any debt, or the enforcement of any right, secured by mortgage or lien upon real or personal property, which action shall be in accordance

with the provisions of this chapter." This part relates entirely to the "action," and not to the form of judgment which the Court may render in the action. It then provides: "In such action the Court shall have power, by its decree of judgment, to direct a sale of the incumbered property," etc. This second clause of the amendment, it will be seen, is substantially the same as the original section before amendment, with the exception that it omits the clause in the original section providing for an "execution for the balance," which is provided for in the third clause of the amendment. Here, then, in this second clause of the amendment, there is no essential change of the law as it was before, relating to the power of the Court to render a personal judgment before sale. It does not limit or prohibit the exercise of any power previously employed by the Court in framing its decrees in foreclosure suits. The last clause of the amended section then provides that "if it shall appear from the Sheriff's return that there is a deficiency of such proceeds and a balance still due to the plaintiff, *the judgment* shall then be *docketed* for such balance, against the defendant or defendants personally liable for the debt, and shall, from the time of such docketing, be a lien upon the real estate of the judgment debtor, and an execution may thereupon be issued by the Clerk of the Court, in like manner and form as upon other judgments, to collect such balance or deficiency from the property of the judgment debtor." Here, again, we find no restriction upon the power of the Court to render a personal judgment before the sale of the mortgaged property. In fact, it does not invoke the aid of the Court at all to carry out its provisions. The return of the Sheriff shows whether there is any deficiency or not, then the Clerk docket the judgment for such deficiency, and issues execution as in other cases. If there should arise any question as to the amount of the deficiency, or the application of the proceeds of the sale, the aid of the Court might be invoked to determine the matter. Again, this clause refers to "*the judgment*," evidently presupposing that a personal judgment might be, or had been, rendered before the sale, and simply providing that after the application of the proceeds of the sale to such judgment, it might then, if there was any deficiency, be docketed for the amount of such deficiency.

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There are many good reasons why no change should be made in the practice of rendering personal judgments in the decree of foreclosure, unless imperatively required by the statute, which are evident to every practitioner. In the present case there is evidently no such requirement, but on the contrary a recognition of the previously existing practice. That practice was well known to the Legislature, and had been settled by numerous decisions of this Court. (*Rowland v. Lieby*, 14 Cal. 156; *Rollins v. Forbes*, 10 Id. 299; *Rowe v. Table Mountain Water Company*, 10 Id. 441.) If they had intended to change that practice, they could readily have done so, in framing the amendment, by using apt words for that purpose. Not having done so, it is evident they did not intend to make any change in that respect. We do not mean to be understood, however, that a personal judgment rendered in a foreclosure suit could be docketed before a sale of the mortgaged property, or that it would become a lien upon other property of the debtor, or that an execution could issue thereon against the debtor's property generally, before the sale and docketing of the judgment for the balance. The provisions of the amendment are all plain and explicit on these points. In the view we have thus taken of the statute, there is no error in the manner of entering the decree in this case.

Judgment affirmed.

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AMENDMENTS to pleadings should be allowed liberally, and the discretion of the Court below in permitting them will rarely be revised.

Thus, where a judgment in favor of defendant had been reversed by the Supreme Court on the ground that certain material evidence which had been received in his favor was inadmissible under his answer, and on the second trial defendant moved to amend his answer by inserting averments of new matter obviating the objection: *held*, that as the amendment was evidently necessary to enable the defense to be fully presented, it was properly allowed by the Court. The fact that new matter set up by an amendment was well known to the defendant at the time he filed his original answer, is no good reason why the amendment should not be permitted.

The granting of time to file counter affidavits on a motion to change the place of

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trial is a matter of discretion in the lower Court and will not be reviewed on appeal.

The granting or refusing of a motion to change the venue on the ground of convenience of witnesses is discretionary with the trial Court, and subject to review only in cases of abuse.

Where a change of venue is asked by defendant on the ground of his residence, if the convenience of witnesses requires that the action should be retained for trial in the Court where it was commenced, the plaintiff should present that fact in opposition to the motion, and if he neglects to do so, it is doubtful whether he can afterwards apply to the Court to which it has thus been removed, to have it sent back again.

APPEAL from the Fifth Judicial District.

This case was before the Supreme Court at the October Term, 1862, and a report of the proceedings on that appeal will be found in 21 Cal. 122, showing the nature of the action, the character of the pleadings, and the grounds upon which a new trial was ordered. On the filing of the *remittitur*, defendant moved for leave to file an amended answer, in which, in addition to the facts set forth in the original, he averred that the actual verbal agreement between him and his creditors, embraced a stipulation on their part that the reception of fifty cents on the dollar should be in full satisfaction of their demands, but that this stipulation was by mistake of the scrivener omitted from the written contract, and that the parties signed the same without noticing the omission. Defendant prayed that the written contract be reformed in this respect and enforced as corrected. Under the exception of plaintiff the Court permitted this amended answer to be filed. Plaintiff then filed an affidavit showing that a large number of his material witnesses resided in San Francisco County and City, where the facts about which there was dispute had transpired, and moved thereon for a change of venue to the Twelfth District Court. Defendant asked for one day's time to file counter affidavits which under plaintiff's exception was granted, and on the following day defendant filed an affidavit contradicting many of the facts stated in the affidavit of plaintiff, and showing also that the action had originally been brought in the Twelfth District Court, but had on defendant's motion, and a showing that he was a resident of Stockton, been removed to the Fifth District.

On these affidavits the motion for change of venue was heard and by the Court denied, to which plaintiff excepted. From this order the appeal is taken by plaintiff.

M. Compton, for Appellant.

I. The Court erred in allowing the defendant to file an amended answer. There is a restriction upon the power of the Court to allow amendments, and it can only be done upon affidavit showing good cause, and upon such terms as may be just. There certainly can be no justice after a party has had an opportunity to plead in a case, to allow him to come in and file an entire new answer without any cause being shown therefor, setting up facts which, as appears upon the face of the answer itself, were within his knowledge at the time of filing the answer in the first instance. (*Hawes v. Hoyt*, 11 How. 454; *Woolcott v. McFarlan*, 6 Hill, 227; *Lovett v. Cowen*, Id. 223; *Hillegan v. Holden*, 1 Wend. 302; *Guntery v. Catlin*, 1 Duer, 258.) And no terms were imposed by the Court for allowing the amendment. The statute in this respect is imperative. (Prac. Act, Sec. 68; *Roland v. Kreyenhagen*, 18 Cal. 455.)

II. The Court erred in allowing the defendant one day to file counter affidavits on motion to change venue after the coming on and hearing of said motion. Such practice is unwarranted and without precedent. It deprived the plaintiff of all opportunity of meeting the facts contained in the affidavit; and besides, the statute requires that counter affidavits must be served at least one day before the coming on and hearing of the motion.

III. The Court erred in denying the plaintiff's motion for a change of venue or place of trial. In determining motions for a change of venue or place of trial in transitory actions, the convenience of witnesses is the chief object to be considered by the Court. And "Courts now look beyond the affidavit of the parties and the advice of their counsel, to the cause of action and defense, to ascertain what is to be tried, and to determine, from a view of the whole case as presented by the pleadings and affidavits, whether a change of place of trial will really accommodate and be most convenient for the greatest number of witnesses, who in the reasonable and proper exercise of care and prudence in the preparation for trial

will be required to attend the circuit." (*King v. Vanderbilt*, 7 How. Pr. 385; *Jordan v. Garrison*, 6 Id. 6; *Goodrich v. Vanderbilt et al.*, 7 Id. 467; *Hull v. Hull*, 1 Hill, 671; *People v. Wright*, 3 Code, 75; *Beardsley v. Dickerson*, 4 How. 81.)

G. W. Tyler, for Respondent.

I. The removal of a cause for trial is a matter resting in the discretion of the Court, and the Supreme Court will not interfere with the exercise of that discretion, even in criminal cases, unless it clearly appears that the Court below has grossly abused its power. (*People v. Fisher*, 6 Cal. 155.)

II. The action is one of assumpsit, and the defendant had a right to have the trial in the county of his residence. (*Loehr v. Latham*, 15 Cal. 462.)

III. The amendment to the answer was necessary to enable defendant to present his defense, and was therefore proper.

CROCKER, J. delivered the opinion of the Court—COPE, C. J. and NORTON, J. concurring.

This action was brought to enforce a contract, in the District Court of the Twelfth Judicial District, in the City and County of San Francisco, and the defendant being a resident of the County of San Joaquin, the action was removed for trial to the District Court of that county on his application. A trial was had in the latter Court and a judgment rendered for the defendant, from which an appeal was taken, and this Court reversed the judgment and ordered a new trial. Upon the return of the case the defendant moved the Court below, upon affidavit and notice, for leave to amend his answer by setting up an alleged mistake in the contract sued on, for want of which allegation the judgment had been reversed by this Court. The Court granted leave to amend and the plaintiff excepted. The plaintiff then moved the Court, upon the pleadings and affidavit and notice, to change the place of trial to the City and County of San Francisco, which was denied and the plaintiff excepted.

The first error assigned by the appellant is, that the Court erred in allowing the defendant to file an amended answer. The amend-

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ment asked for was evidently necessary to enable the defendant to fully and fairly present his defense to the action. The fact that the new matter set up by the amendment was well known to the defendant when he filed his original answer was no good reason why he should not have been permitted to amend. The rules relating to the amendment of pleadings are properly very liberal, and much is left to the judgment and discretion of the Court below. In this case there was no error in permitting the defendant to amend.

The Court also granted the defendant one day to file counter affidavits on plaintiff's motion to change the place of trial, and this is also assigned as error. This is also a matter of discretion in the Court, and the Court very properly granted time to file counter affidavits. If thereby the plaintiff required further time to prepare for his motion, the Court would undoubtedly have granted it; but no application to that effect seems to have been made.

The next error assigned is that the Court ought not to have refused plaintiff's motion for a change of the place of trial. We see no error in this action of the Court. When the defendant applied for a change of the trial from San Francisco to San Joaquin, if the convenience of witnesses required that the action should be retained for trial in San Francisco, the plaintiff should have presented that fact in opposition to that motion, and if he neglected to do so, it is doubtful whether he could afterwards apply to the Court to which it had been thus removed to have it sent back again. (*Loehr v. Latham*, 15 Cal. 418.) The granting of such motion is discretionary with the Courts, subject to review only in cases of abuse. (*Sloan v. Smith*, 3 Id. 412.) No such abuse of discretion is shown in this case.

Judgment affirmed.

RUSSELL v. MANN *et al.*

ALL the provisions of the statutes for the assessment of taxes, and for the sale of property for their non-payment must, in their substance, be strictly pursued, in order that a title acquired at such a sale shall be valid.

Whenever a tax title is specially set forth in a pleading, it is necessary that every

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fact should be averred which is requisite to show that each of the statutory provisions has been complied with. This necessity is not obviated by the provisions making the tax deed proof of certain facts.

In pleading a tax title, it is necessary to aver those facts which, by Secs. 18 and 22 of the Revenue Act of 1857, are required to be stated in the tax deed.

A pleading, setting up a tax title, must aver distinctly for what year the tax was assessed, and failing to do so, is demurrable.

It will not be inferred that a tax was levied for a certain year, from an averment that in that year the assessor entered the levy on the assessment roll.

Whether, under the provisions of the Revenue Act of 1857, it would be sufficient, in pleading a tax title, to state that the property "was assessed," without stating the acts done to constitute the assessment, or the officer by whom, or time of year when done—*Query?*

APPEAL from the Sixteenth Judicial District.

This was an action to recover a quartz mill, in Amador County, in which the defendant set up title under a tax deed. The answer upon this point avers, "that by virtue of an act of the Legislature of the State of California, entitled 'An Act to provide Revenue for the Government of the State,' passed May 15th, 1854, and the several acts amendatory thereof, and by virtue of an act entitled 'An Act to provide Revenue for the support of the Government of the State,' passed April 29th, 1857, a tax was imposed upon certain improvements situated within the limits of said County of Amador, and described on the tax list or assessment roll as follows: 'one quartz mill situated on Rancheiro Creek, one half a mile below the town of Rancheiro, in township No. 4,' (which is the same mill sued for in said complaint), which improvements were assessed to Rancheiro Quartz Mining Company; and that on the third Monday of October, A. D. 1859, the tax being unpaid, W. J. Pough being at the time last aforesaid Sheriff and Tax Collector of the said County of Amador, on that day, at the close of his official business, did enter upon the tax list or assessment roll a statement that he had made a levy upon all the property assessed on said roll upon which the taxes had not been paid, in which description was included the above described property." The answer continued to allege in detail, and in proper form, a pursuance of all the requirements of the revenue law subsequent to the levy, and including the making of the tax deed, under which defendant claims.

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The plaintiff demurred to this answer on the ground that it did not state facts sufficient to constitute a defense, and particularly that it did not show that any valid assessment of the property had been made, as required by the revenue law.

The demurrer was sustained. Plaintiff had judgment, and the defendant appeals.

Selden S. Wright, for Appellant.

It is alleged as ground of demurrer, that the answer fails to show when, by whom, in what manner, and to what amount, said alleged tax was imposed, levied, and assessed, upon the property therein mentioned.

This is not essential to the validity of a tax sale, or necessary to be pleaded. Sec. 23 (Wood's Digest, 621) is as follows: "The matters directed by Sec. 18 to be substantially recited in the tax certificate, and by Sec. 22, in the deed, shall be deemed and they are hereby declared to be all the requisites essential to the validity of sales made for taxes or assessments," etc.

Then referring to Sec. 18 to find what these only essentials are, we find them to be stating, substantially: 1st, that the property was assessed—(this is stated in our answer); 2d, giving when known the name of the person to whom it was assessed—(this is also stated); 3d, that taxes were levied on it according to law—(this is also stated); and so of all the other particulars enumerated in that section.

James F. Hubbard, for Respondent.

NORTON, J. delivered the opinion of the Court—FIELD, C. J. and COPE, J. concurring.

All the provisions of the statute for the assessment of taxes and for the sale of property for their non-payment must, in their substance, be strictly pursued in order that a title acquired at such a sale should be valid. Whenever a tax title is specially set forth in a pleading it is necessary that every fact should be averred which is requisite to show that each of the statutory provisions has been complied with. Owing doubtless to the number of acts required to

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be done in the assessing and levying of taxes, and in the proceedings to sell property for their non-payment, and the embarrassments attending the proof of many of them, especially after the lapse of any considerable time, the Legislature has provided that the deed executed upon such a sale shall state certain of these essential facts, and shall be proof of the matters by it set forth, subject to certain exceptions. But this provision as to the effect of the deed as evidence does not dispense with the necessity of averring every essential fact in a pleading in which a tax title is specially set forth.

Sec. 23 of the Revenue Act of 1857 provides that the matters directed by Secs. 18 and 22 to be recited in the deed shall be all the requisites essential to the validity of sales made for taxes. By these sections it is required that the deed, among other things, shall state substantially "that the property was assessed, giving (when known) the name of the person to whom it was assessed; that taxes were levied on it according to law; that these taxes had not been paid." In pleading a tax title it is necessary among other things to aver these facts. For the purpose of making these averments, the defendant in his answer alleges that under the Revenue Acts of 1854 and 1857 a tax was imposed upon certain improvements (being the property in suit), which improvements were assessed to the Rancheiro Quartz Mining Company, and that on the third Monday of October, 1859, the tax being unpaid, the Tax Collector made an entry on the assessment roll that he made a levy upon all the property assessed on said roll and upon which the taxes had not been paid, in which description was included the property in suit.

The allegation does not state for what year the tax was imposed on which the sale was made, nor does it state by whom the assessment was made, nor any facts by which it would appear that it was made within the periods of the year and in the manner prescribed by the statute. Supposing that by virtue of Secs. 18, 22, and 23 of the Revenue Act of 1857, it would be sufficient to state in the language of the statute, that the property "was assessed," without stating the acts done to constitute the assessment, or the officer by whom, or time of the year when done (and as to which it is not intended to express an opinion), nevertheless it was, in our

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opinion, necessary to state distinctly for what year the tax was assessed. Taxes are to be levied and property assessed each year. Notwithstanding any statements in a tax deed, proof may be made that the tax was paid. (Sub. 3, Sec. 23.) In order to make such proof in this case, it would have been necessary for the plaintiff to reply such payment, and for such purpose some particular tax should have been averred in the answer. It may be argued that it is to be inferred that the tax was imposed for the year 1859 from the averment that in October of that year the assessor entered the levy on the assessment roll. This averment is not made as a description of the tax, but to show that a levy was made on the day of the year prescribed by statute, and we do not think an inference to be drawn from such a statement is equivalent to an allegation of this material fact.

The demurrer was therefore properly sustained, and the judgment is affirmed.

THE PEOPLE v. FORBES.

A JUDGMENT in a criminal action that the defendant be imprisoned for a specified term, "to commence at the expiration of previous sentences," is valid and warrants the detention of the defendant for the aggregated period of all the sentences.

Judgments of inferior criminal Courts created by statute are not required to be of any different form from those of criminal Courts of general jurisdiction.

APPLICATION for *habeas corpus*.

The facts appear in the opinion.

D. Barde, for Petitioner.

I. The conviction and judgment were in and by a Court of Summary Proceedings, therefore in derogation of the common law, and therefore its proceedings must be strictly governed by the special statute from which its authority is derived. (*The People v. E. Phillips*, 1 Parker's Cr. 95 ; also see 99, last paragraph.) The Police Court is a creature of the "Consolidation Act," the

powers of which are those of a Justice of the Peace, and where not otherwise provided for, those of the Recorder's Court. (Stat. 1856, 151, Secs. 19, 20.) By that act, there is no power conferred upon the Police Court to make a term of imprisonment commence at any time in the future, neither does the statute in relation to the Recorder's Court (Wood's Dig. 156, Secs. 72-79 inclusive) give any such power. The Police Court being a Court of Summary Proceedings, its proceedings and powers must be subject to strict rules of construction. (Hurd on Habeas Corpus, 405, 406; Note from 1 Burns' Jus. 409, on last page; 1 Parker's Cr. 95, 96, 98-107.)

Admitting that Sec. 459 Criminal Practice (Wood's Dig. 306) does apply to the Police Court, the judgments of the Police Court are void, in so far as they or any of them refer to any time when the term of imprisonment shall commence. Each judgment, if to take effect at any time in the future, or after any previous judgments, must recite the previous judgments—their duration exactly—in order that the Sheriff shall know exactly by looking at the commitment what to do in every particular. The first commitment of those annexed to the Sheriff's return, it will be admitted, has been fully complied with by the defendant, and is therefore of no further force or effect. The other commitments, taken by themselves, specify no terms except those of ninety days mentioned therein, and the Sheriff has no right to look at any other judgment or commitment to ascertain his duties or see when they are to be in operation. If the judgment of the Court does not set forth the time from whence the imprisonment shall commence, it is void. *Kelly v. State*, 3 Smedes & Marsh. 518; referred to in Digest of Crim. Law, title "Sentence," 657; 3 T. R. 338; also, 1 Parker's Cr. bottom of 105.) The trials of the defendant were, and of necessity must be separate and distinct, each from any other, and the proceedings and records thereof, must also be separate, distinct, and complete, each in itself, or else it is wholly and absolutely void. And everything necessary to support a commitment must appear on the commitment itself, and its validity must be determined by what appears on the face, not by reference to matters *dehors*. (Hurd on Habeas Corpus, 409, 410, bottom of the page,

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also 415, third paragraph; *Rex v. James*, 5 B. & A. 894; *Rex v. Hall*, 3 Burr. 1636; *Baldwin v. Blackman*, 1 Id. 602; *Bracy's Case*, 1 Id. Raym. 100.)

N. Porter, District Attorney, for the People.

NORTON, J. delivered the opinion of the Court—COPE, C. J. and CROCKER, J. concurring.

The defendant is held in custody by virtue of five separate sentences passed upon him on the sixth day of September, 1862, by the Recorder's Court of the City and County of San Francisco. One adjudges that he be imprisoned for the period of ninety days. Each of the others adjudges that he be imprisoned for the period of ninety days, "said term to commence at the expiration of previous sentences." Having been imprisoned more than ninety days, he claims now to be discharged, upon the ground that the sentences to commence at the expiration of previous sentences are void, for not fixing any definite time for the commencement of the imprisonment.

As a general rule, a judgment should be certain and definite, and complete in itself, so that what it requires to be done may be known without resort to anything outside the record, yet it seems to have been a common practice in criminal Courts to enter judgments of imprisonment to commence at the expiration of sentences in other cases. (*King v. Wilkes*, 4 Burr, 2575; *Commonwealth v. Leaths*, 1 Virg. Cases, 151; *State v. Smith*, 5 Day, 175; *Russel v. Commonwealth*, 7 Serg. & Rawle, 489; *Brown v. Commonwealth*, 4 Rawle, 259.)

In the case of *Brown v. Commonwealth*, the sentence was that the defendant's imprisonment should begin "immediately after the expiration of the sentence passed upon him for the larceny of the goods of Hiram Jones." The judgment for the larceny of the goods of Hiram Jones was reversed on appeal, and it was claimed that the other judgment thereby became a nullity. But it was decided that the judgment in the one case being in force until it was reversed, the expiration of the sentence occurred upon its reversal and that the second imprisonment began from that time. In that

case, therefore, a sentence was held valid which was not only indefinite on its face, and could only be made definite by resorting to the record in another case, but in which the time of commencement of the sentence was changed by an occurrence happening in the other case after the sentence had been pronounced.

It is further objected in the case before us that the subsequent sentences do not refer to any other particular sentence, and are thus not only indefinite themselves but do not point to any certain means by which they may be made definite, or by which the time of the commencement of the imprisonment can be ascertained. We have not found any case in which the sentence was in the general language used in this case, to wit: "Said term to commence at the expiration of previous sentences." In the State of New York it is provided by statute, that in case of two or more convictions before sentence on either, the term of imprisonment upon the second or subsequent conviction shall commence at the termination of the previous term of imprisonment. (2 Rev. St. of N. Y. 700.) In regard to this provision, the revisers say it is "generally declared in the sentence, but as it may be omitted it is deemed useful to provide for it by law." It would seem that under this statute, in that State, if, in the case of two or more convictions, the sentences should be in terms simply for a specified time of imprisonment, saying nothing as to the time of its commencement or as to any former conviction, the term of the second imprisonment would commence at the termination of the first. The effect of this is that under a commitment on such a second judgment the officer would justify the imprisonment of the defendant by showing that the term of imprisonment did not commence at the date of the judgment or commitment in consequence of the existence of a prior judgment, but which was not mentioned in the second. We have no statute of exactly the same import in our State, but we may deduce the inference from the enactment of such a statute in New York upon the recommendation of a commission of eminent and experienced jurists, that it is not an anomaly in criminal proceedings that the time of commencement of a term of imprisonment should depend upon the existence of other judgments not specified and to be ascertained only by referring to the records of the Court. If a judg-

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ment is valid, as in the case of *Brown v. Commonwealth*, above cited, which requires an examination of the records of the Court in another specified case to fix the commencement of the term of imprisonment, we can see no reason why a judgment should not be valid in which the commencement of the term of imprisonment is to be fixed by ascertaining by reference to the records of the Court the termination of the terms of imprisonment of any prior sentences that may have been imposed upon the same defendant.

We do not think the question is affected by the circumstance that the sentences in this case were pronounced by a Court created by statute, and of a limited and inferior jurisdiction. The statute creating the Court does not, we believe, prescribe what shall be the form of its judgments in this particular. The Court may render its judgments in cases within its jurisdiction in the usual form of judgments of criminal Courts under similar circumstances.

The case is not clear of embarrassment, but we think the judgment may be sustained under the settled practice in analogous cases.

The prisoner must, therefore, be remanded.

LAZARD v. WHEELER.

REPLEVIN lies for all goods and chattels unlawfully taken or detained, and may be brought whenever one person claims personal property in the possession of another, and this whether the claimant has ever had possession or not, and whether his property in the goods be absolute or qualified, provided he has the right to the possession.

Where personal property is wrongfully detained, the owner may assign his title thereto, and the assignee may maintain an action therefor.

A right of action for the wrongful taking and conversion of personal property is assignable, and under the provisions of the code the assignee can recover upon the same in his own name.

The complaint averred that defendant wrongfully took and detained from one Johnson certain county warrants owned by the latter; that subsequently Johnson assigned to plaintiff his right in the warrants and the moneys which might be made on the same; and, that after this assignment plaintiff demanded the warrants from defendant who refused to deliver them: *held*, that this complaint stated a sufficient cause of action; that as assignee of Johnson, plaintiff was entitled to recover the warrants or their value with damages for detention accruing after the assignment.

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APPEAL from the First Judicial District.

The facts are stated in the opinion.

R. H. Loyd, for Appellant.

The assignment made in this case is not of a mere tort, or a chose in action arising out of tort, but of the property itself; and the suit is brought, not for the damages arising from a tort, but for the property. If the warrants are choses in action they do not arise or grow out of the tort committed by defendant in taking them; they existed before the taking and therefore could not arise out of it. In *Oliver v. Walsh* (6 Cal. 450), cited by respondent, the chose was created by and arose out of the tort of defendant. The New York decisions cited by respondent were made in actions brought to recover damages arising out of tort; that is, damages that were created by the tort committed before the assignment. The decisions in that State under the code are to the effect that after the conversion of a chattel, or an injury to real or personal property, the owner may either sell the chattel itself, or assign his right of action for the conversion. (*Hall v. Robinson*, 2 Comstock, 295, 296—where the case in 12 Wend. cited by respondent is virtually overruled;—*Cass v. New Haven R. R. Co.*, 1 E. D. Smith, 522; *McGinn v. Warden*, 3 Id. 335; *Wilson v. Cook*, Id. 252; *Horell v. Kroose*, 4 Id. 357; *McKee v. Judd*, 2 Herman, 622; *Hoyt v. Thompson*, 1 Seld. 346, 347.) In Pennsylvania it has also been decided that, “an action of trespass, *de bonis asportatis*, was assignable. (*North v. Turner*, 9 Serg. & R. 248, 249; see also *Brig Sarah Ann*, 2 Sumner, 211; *Hunt v. Robinson*, 11 Cal. 277.)

John Reynolds, for Respondent.

The complaint shows upon its face, that the wrongful and unlawful taking of the warrant was while Johnson was the owner; and that before he assigned the right of action to the plaintiff, Johnson demanded them from the defendant, who refused to deliver them upon such demand, but kept and detained them unlawfully from him. This was a conversion of the property, and a wrongful

appropriation of the warrants to his own use before the assignment. Therefore, Johnson could not sell the warrants themselves but the right to sue for the property only. The assignment was nothing more than the transfer of a right of action, or a right to litigate arising out of a tort. An assignment of that nature was never allowed either at law or in equity, nor is it allowed under the statute of this State, nor even under the code of New York, which is much broader than that of our State. (*Oliver v. Walsh*, 6 Cal. 456; *Wayburn v. White*, 22 Barb. 82; *Zabriskie v. Smith*, 3 Kernan, 333; *Same case*, 322; 11 How. 97; 4 Duer, 660; *Broughton v. Smith*, 26 Barb. 635; *Thurman v. Wells, Fargo, et al.*, 18 Id. 500; *Gardner v. Adams*, 12 Wend. 297.)

CROCKER, J. delivered the opinion of the Court—COPE, C. J. and NORTON, J. concurring.

The complaint in this case avers that on the first day of June, 1859, the defendant wrongfully took certain county warrants, owned by Charles R. Johnson, and refused to deliver the same to Johnson upon demand, but unlawfully kept and detained the same; that on the first day of November, 1859, Johnson sold, transferred, and assigned to the plaintiff all his right, title, and interest, in the warrants and the moneys which might be made on the same; that plaintiff has often since demanded the warrants of defendant, who refused to give them up; and that the warrants are of the value of eight hundred dollars; concluding with a prayer for judgment for the delivery of the warrants; or if a delivery cannot be had, then for their value, with three hundred dollars damages for the unlawful detention and costs of suit. To this complaint the defendant demurred, alleging as ground of demurrer that the complaint does not state facts sufficient to constitute a cause of action. The demurrer was sustained, and judgment rendered for the defendant for costs, from which the plaintiff appeals.

The questions necessary to determine this case are: 1st, can property of this kind, in the possession of a wrongdoer, be assigned by the owner? and 2d, can such assignee maintain an action to recover the possession of the property, or for its value if possession cannot be had, with damages for its detention? It does not appear

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that the plaintiff sues to recover damages for the detention of the property prior to the assignment to him, so that the question, whether a right of action arising out of a tort is assignable, is not properly before us.

Replevin lies for all goods and chattels unlawfully taken or detained, and may be brought whenever one person claims personal property in the possession of another, and this whether the claimant has ever had possession or not, and whether his property in the goods be absolute or qualified, provided he has the right to the possession. (Morris on Replevin, 37.)

Where personal property is wrongfully detained, the owner may assign his title thereto, and the assignee may maintain an action therefor. (*Cass v. The N. Y. and N. H. R. R. Co.*, 1 E. D. Smith, 522; *McGinn v. Worden*, 3 Id. 355; *Hall v. Robinson*, 2 Comstock, 295; *The Brig Sarah Ann*, 2 Sumner, 211; 2 Hilliard on Torts, 275.)

A right of action for the wrongful taking and conversion of personal property is assignable, and under the provisions of the code the assignee can recover upon the same in his own name. (*McKee v. Judd*, 2 Kernan, 622; *Hoyt v. Thompson*, 1 Selden, 347; see also *North v. Turner*, 9 Serg. & Rawle, 244.)

The complaint in this case sets forth sufficiently a cause of action. The demurrer was therefore improperly sustained.

The judgment is reversed, and cause remanded for further proceedings.

FOGARTY v. SPARKS *et al.*

UNDER a writ of restitution issued upon a judgment in favor of the plaintiff, in an action of ejectment, it is the duty of the officer serving the writ to remove from the premises the parties defendant and all persons who have derived possession from them since the commencement of the action, with notice actual or constructive, and also all other persons, although not parties or in privity with them, who have acquired possession subsequent to the filing of a *lis pendens* in the action, or with actual notice of its pendency.

A person in possession of the premises at the time of the commencement of the action of ejectment, unless made a party defendant, is not affected by the

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judgment, nor can he, or those holding under him, be dispossessed by a writ of restitution issued thereon.

In an application for *mandamus* to compel a Sheriff to remove from possession of the premises, under a writ of restitution, an occupant who was not a party to the action, it must be shown distinctly by the affidavits that his possession was acquired under the parties or subsequent to the filing of a *lis pendens*. If these matters are left in doubt the application will be denied.

APPEAL from the Fourth Judicial District.

The facts are stated in the opinion.

John Currey, for Appellant.

Hervey Sparks, as the owner of the premises, and having the right to the possession and enjoyment thereof, could at any time enter into the possession and enjoyment of the same, whether before or after the commencement of the action of plaintiff, provided he did so without violence. He had rights that could not be lawfully jeopardized by the action and judgment of Fogarty. His possession and right of possession was and is independent of and without any privity with either the plaintiff or any of the defendants in that action; and therefore, though his tenant was let into the possession after filing the notice of *lis pendens*, and after the judgment was obtained, neither the landlord nor his tenant could be affected by such notice, because such notice could only affect subsequent purchasers or incumbrancers deriving some interest in the premises by, through, or under the defendants, or some of them. (*Richardson v. White*, 18 Cal. 105–108; Practice Act, Sec. 27.)

Hervey Sparks has not had his “Day in the Court,” and hence cannot be justly prejudiced by the action and judgment of Fogarty, nor by anything depending on such judgment. (*Bloom v. Burdick*, 1 Hill, 139.)

It is said on behalf of Fogarty that the verdict in his action was conclusive that he was peaceably in actual possession at the time of the entry of defendants. But will it be insisted that it was conclusive as to others than the defendants and those holding in privity with them? A position that such is the effect of a judgment, except as to parties and privies, results in the denial to a party who has had no opportunity of being heard in his own behalf, of any

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defense of his right whatever. The case of *Fremont v. Crippen* (10 Cal. 214), cited for plaintiff, does not establish or tend to establish any such doctrine.

At common law the right of the owner of the land stood protected from a judgment obtained by the default of the tenant or by collusion between the plaintiff and the tenant in possession, as also from a judgment recovered against a casual ejector.

In this State, the tenant in possession (if there be any) is not bound under any penalty whatever to give notice to his landlord of an action brought against him (the tenant) to recover the possession of the land. And it is at least doubtful under the decisions of this Court, whether the owner, who is not in actual personal possession, has the right to appear in his own name and become a defendant in the action of ejectment brought against a third person. (*Garner v. Marshall*, 9 Cal. 270; *Klink v. Cohen*, 13 Id. 624.)

In *Garner v. Marshall*, the Court say: "Ejectment is a possessory action, and must be brought against the occupant; it determines no rights but those of possession at the time, and it matters not who has, or claims to have, the title of the premises."

In *Ex parte Reynolds* (1 Caines, 500), Spencer, J. said: "It is a settled rule of practice that no tenant who was in possession anterior to the commencement of an ejectment, can be dispossessed upon a judgment and writ of possession."

In *Jackson v. Stiles* (5 Cow. 418), it appeared that previous to the judgment, the defendant had extinguished all the rights adverse to him except three-eighths of the premises, but the plaintiff had perfected judgment for the whole, and had taken possession generally by a writ of possession. The Court held that the plaintiff had taken possession beyond his right, though the execution was unqualified, and ordered that the defendant be restored to five-eighths of the premises. (See also 4 Ala. 592; 4 Dana, 369; 6 B. Monroe, 62; 7 Halsted, 277.) Hervey Sparks had been the owner and in possession since February, 1859. This was alleged by the answer, and was not gainsayed by the relator.

That the Sheriff could properly refuse to execute the writ to the extent of turning Kennelly out of possession, there seems to be no reason to doubt. (*Earl v. Camp*, 16 Wend. 567, 568.)

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The Court that rendered the judgment in the case of *Fogarty* had not acquired jurisdiction of either Hervey Sparks or his tenant, Kennelly; and the writ, it may be presumed, did not require the Sheriff to deliver the possession of the premises that were in Kennelly's actual possession, to the plaintiff, who had no right to the possession thereof as against Hervey Sparks and his tenant. (Practice Act, Sec. 210, Sub. 4.)

E. A. Lawrence, for Respondent.

I. This application was made below, before the same Court which tried the suit of *Fogarty v. Sparks et al.*; and it was a matter entirely in the discretion of that Court whether to order an issue to be tried by a jury or not. (Pr. Act, Sec. 472.)

The answer of the Sheriff being insufficient as a return, the Court properly granted the order. (*People v. Collins*, 7 Wend. 549; *Rinehell v. Winemiller*, 4 Har. & McHen. 429; 2 Burrill's Pr. 178, "Return to writ," and cases there cited.) The return must be certain. Every allegation therein must be direct, and be stated in the most unqualified manner with certainty and plainness. (*Commonwealth v. Commissioners of Alleghany*, 32 Penn. 218; 2 Selwyn N. P. 829 marginal page; 11 Rep. 99; 1 Ld. Raymond, 559.) Every intendment is made against a return which does not answer the material facts. (*The People v. Kilduff*, 15 Ill. 492.) The Sheriff cannot refuse to execute the writ upon mere hearsay. He cannot take the *ipse dixit* of Kennelly that he is the tenant of Hervey Sparks, and that Sparks has title. He must be informed upon the title of Kennelly, and present that title to the Court with as much particularity and certainty as if he were pleading it in an action, or the allegation will be disregarded. (*The People v. Flagg*, 16 Barb. 507.)

II. If the loose and indefinite answer of the Sheriff in this case should be held sufficient, we might as well abolish the action of ejectment, for at the end of a long-contested suit, the plaintiff would be no nearer the possession of the premises than at the beginning.

This answer does not allege the source of Hervey Spark's title, and it does not deny the allegation of plaintiff that it is derived from Z. W. Sparks. Hence, it is to be taken as true. This estab-

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lishes privity of title between Z. W. Sparks and Kennelly; and inasmuch as Z. W. Sparks was in possession at the time of suit, it makes no difference whether he conveyed to Hervey Sparks before or after suit brought. This action cannot be prejudiced by such alienation. (Pr. Act, Sec. 263.) The allegation in the Sheriff's answer of the tenancy of Kennelly from Hervey Sparks is too indefinite to present an issue on that point.

III. The judgment in ejectment is conclusive of the fact that Z. W. Sparks was in possession at the time of judgment of this portion of these premises, which point cannot be gainsayed collaterally. (*Fremont v. Crippen*, 10 Cal. 211; *Noe v. Card*, 14 Id. 576; *Montgomery v. Tutt et al.*, 11 Id. 190.)

The Courts, after judgment, make every possible intendment in favor of the claimant, and if the title declared on can, by any means, be supposed to exist, consistently with the judgment, such judgment will be supported. (Tillinghast's Adams, 293, marg. 287.)

The old authorities all hold that the lessor of plaintiff in ejectment after judgment, might enter peaceably upon the premises recovered, without any writ of restitution, because the judgment is evidence of his right of entry. (*Jackson ex dem. Buckman v. Haviland*, 13 Johns. 229; Tillinghast's Adams, 408, marg. 299; *Tribble v. Frame*, 5 Litt. Ky. 187.)

And the doctrine was well established that the Courts would seldom grant a new trial, in ejectment, when the verdict is for defendant, because all the parties remained in the position they were before the action was commenced. But this principle did not apply when the verdict was against defendant, because the possession was then changed. (Tillinghast's Adams, 388, marg. 326.)

And this Court has gone to the extent of even holding that strangers to the proceedings can be dispossessed, because the writ of possession requires the Sheriff not only to put the defendants out, but to put the plaintiff in possession of the premises. (*Fremont v. Crippen*, 10 Cal. 211; see, also, *Montgomery v. Tutt et al.*, 11 Id. 190; *Skinner v. Beatty*, 16 Id. 157; *Ex parte John Black*, 2 Bail. 8; *Jackson v. Tuttle*, 9 Cow. 240.)

IV. "The possession to be given by the Sheriff is a full and actual possession, and he is armed with all power necessary to this

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end." (Tillinghast's Adams on Eject., marg. 342; Bouv. Law Dic. "*Hab. fa. poss.*")

"If the officer be disturbed in the execution of the writ, the Court will, on affidavit of the circumstances, grant an attachment against the party, whether he be the defendant or a stranger." (Id. 343, marg.; 2 Bur. Pr. 327; *Kingsdale v. Man*, 6 Mod. 27; S. C. Salk, 321.)

An order cannot be made at the instance of a stranger to the judgment to arrest the execution of the writ of *hab. fa.*, although after its execution if he is improperly turned out of possession, he may, in certain cases, on motion to the Court, be restored to the possession. (*Hall v. Hilliard*, 6 Ala. 43.)

If the party sought to be ousted has a good title, he may bring ejectment or forcible entry and detainer, or apply for a writ of restitution. (*Doe on demand of Ledger v. Roe*, 3 Taunt. 605.)

Any person who enters into possession of premises *pendente lite* (after *lis pendens* filed as in this case), must be removed from possession under the writ.

Where A brought ejectment against B, and C and D took possession of the land in dispute, *pendente lite*, and A recovered a verdict and judgment: *held*, the Sheriff, by virtue of the writ, must dispossess C and D in favor of A. (*Hickman v. Dale*, 7 Yerg. 149; *Howard v. Holman*, 4 Ala. 592; *Taylor v. Fox*, 2 B. Munr. 429; *Jones v Childs*, 2 Dana, 25.)

CROCKER, J. delivered the opinion of the Court—COPE, C. J. and NORTON, J. concurring.

On the eleventh day of April, 1860, Fogarty brought an action to recover the possession of a certain lot in the City of San Francisco, against Z. W. Sparks, Wolf Light, and others, notice of the pendency of which was filed under the statute, June 2d, 1860, and judgment was rendered therein in favor of the plaintiff against the defendants, August 28th, 1860. On the second of October, 1860, execution was issued on the judgment and placed in the hands of Doane, as Sheriff, for service, who, in pursuance of the writ, dispossessed Wolf Light, one of the defendants, and placed the plaintiff in possession of part of the premises, but finding one Kennelly in

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possession of the other part, claiming as a tenant under Hervey Sparks, who was not a party to the action, he declined to dispossess Kennelly, or to put the plaintiff in possession of that portion of the premises occupied by him. The plaintiff then applied to the Court for a writ of *mandamus* to compel the Sheriff to put him in possession of that part occupied by Kennelly. The writ was granted, and the defendants have appealed from the order granting it to this Court.

The affidavit for the writ sets forth, in addition to the above facts, that Kennelly pretends to hold under a lease from E. B. Mastick, an attorney for Hervey Sparks, brother of Z. W. Sparks, and claims to have been in possession about two weeks before the date of the affidavit, October 5th, 1860; that Hervey Sparks pretends to have derived possession from Z. W. Sparks; that there was no house on the part of the premises in possession of Kennelly until after the judgment, and no person living thereon; that a house has been built thereon since the judgment, and Kennelly has taken possession of it; that it was built by the direction of Z. W. Sparks, and that Z. W. Sparks, in his answer filed in the action, admitted himself to be in possession of the premises.

Doane, in his affidavit, denies the material portion of the allegations in the plaintiff's affidavit, upon information and belief, and avers, in like form, that Kennelly entered into possession as tenant under Hervey Sparks; that Hervey Sparks was the owner in fee simple on the twelfth of March, 1860, and ever since has been such owner and in possession of the premises; that he was not made a defendant in the suit, and his possession, or right of possession, was not determined by it. No proof appears to have been offered by either party on the motion for a *mandamus*.

The material fact in this case is, who was in possession of the premises at the commencement of the action, or at the time of the filing of the *lis pendens*. In an action for the possession of real estate, it is of the first importance, that all the parties in possession at the commencement of the suit should be made defendants, otherwise they, or those holding under them, cannot be affected by the judgment rendered in it, or the execution issued to enforce the judgment. For it is a well established principle, that no man can

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be deprived of his rights, or property, without an opportunity of being heard in a Court of justice.

If Z. W. Sparks, or any other defendant against whom judgment was rendered, was thus in possession, then, if Hervey Sparks or Kennelly took possession after the filing of the *lis pendens*, or with actual notice of the pendency of the action, they would be bound by the judgment, and could be dispossessed by the execution, the same as though they were parties to the judgment. If a person not a party in the action, having a title or right of possession, should be thus ejected, his rights would not be determined, but he could litigate them in another suit.

The record in this case is not very clear upon this important fact, whether or not Hervey Sparks was in possession at the commencement of the action. The affidavit on which the motion was founded, does not state directly who was in possession, either at the commencement of the action or the filing of the *lis pendens*. It merely avers that "Z. W. Sparks, by his answer filed in said cause, admitted himself to be in possession of said premises." This is clearly insufficient. Such an admission could only affect Z. W. Sparks, and Hervey Sparks, or any one claiming under him, would not be estopped thereby, nor would it be evidence against them. This fact of possession should have been directly and positively alleged in the affidavit.

So, too, the affidavit of Doane alleges in general terms, and upon information and belief only, that Hervey Sparks was the owner in fee simple and in possession before and ever since the commencement of the suit. This, as evidence, is but mere hearsay, and could not be considered as proof of possession or ownership. Hervey Sparks and Kennelly not being parties to the record, their rights, whatever they may be, could not be affected by the judgment, unless acquired since the filing of the *lis pendens*, or with actual notice, which is not shown in the present case. If such is the case, it should be distinctly averred in the affidavit on which the motion is founded; and if disputed, the question should be determined by the Court below. If it be true that Hervey Sparks was in possession at the commencement of the action, or before the filing of the *lis pendens*, without notice, and that he placed

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Kennelly in possession as his tenant, then Kennelly's is but a continuation of his possession, and neither are affected by the judgment.

Respondent refers to the case of *Fremont v. Crippen* (10 Cal. 211) as sustaining his position. That was a judgment in an action of forcible entry, *and after the judgment one of the defendants put a third party in possession, and the Court properly held that he could be dispossessed by the execution.* The Court say: "The object of the statutes concerning forcible entries is to afford parties whose possession is disturbed by force or violence, a summary remedy. This object would be entirely defeated, *if a defendant, after judgment, could, by transferring the possession to a stranger, prevent the execution of the writ.*" It will be seen that it does not apply to the present case.

The plaintiff may have a case entitling him to the writ, and if so, he can have an opportunity of presenting it in the Court below.

The order granting the writ of *mandamus* is reversed, and the cause is remanded for further proceedings.

RICHARDSON v. SCOTT RIVER W. AND M. CO.

WHERE the meaning of a written instrument is doubtful, extrinsic evidence may be resorted to for the removal of the doubt, but such evidence is not admissible to show that the effect of the instrument is different from that which its terms plainly and unequivocally denote.

Where a bond, made in connection with a mortgage to secure the debt of a corporation was signed by four persons, who neither described themselves as agents of the corporation, nor designated anywhere therein the corporation as the party intended to be bound: *held*, that the instrument was upon its face the personal obligation of the parties signing, and that extrinsic evidence of their official character or of their intentions was inadmissible for the purpose of showing it to be the bond of the corporation.

A conveyance of real property by a corporation must be under its corporate seal. It may alter its seal at pleasure, and may adopt as its own the private seal of an individual, but in the latter case the seal adopted must be used as that of the corporation.

If to a deed, purporting to be that of a corporation, a seal be affixed as that of the individual agent who signs it, such seal cannot be treated as that of the corporation. A declaration in the instrument that the seal is affixed as that of the agent is conclusive of its character and effect.

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It is not necessary to state in a conveyance by a corporation that the seal used is that of the corporation. This fact may, in the absence of any declaration to the contrary, be presumed from the language of the conveyance or proved by evidence *aliunde*.

A mortgage, made in connection with a bond to secure the debt of a corporation, styled the Scott River Water and Mining Company, named as parties of the first part (grantors), W. P. Pool, C. W. Tozer, G. T. Terry, and J. Reid, "President, Directors, and members of the Scott River Water and Mining Company," and concluded as follows: "In witness whereof, the said parties of the first part hereunto set their hands and affix their seals," followed by the signatures of the four persons above named with a seal or scrawl affixed to each: *held*, that this conveyance was not sealed with the corporate seal, and was therefore inoperative as the foundation of any right or claim to the corporate property which it purported to convey.

APPEAL from the Ninth Judicial District.

The mortgage referred to in the opinion was in the points material to the decision in the following form:

"This indenture, made and executed this twenty-first day of December, 1855, between Wm. P. Pool, Charles W. Tozer, George F. Terry, and John Reid, of Scott's Bar Township, Siskiyou County, State of California, President, Directors, and members of the Scott River Water and Mining Company, parties of the first part, and Elijah Steele * * of the second part, witnesseth, that the said parties of the first part, in consideration of * * have and by these presents do grant, bargain, sell," etc., "and the said parties of the first part for themselves, their heirs, executors, and administrators, covenant to and with the said party of the second part," his heirs, etc., "that they are legally incorporated under the laws of the State of California by the name, style, and description of the Scott River Water and Mining Company, for the purpose of" constructing the Scott River Ditch, etc., "and that by such charter they have acquired the sole and exclusive right" to the water privilege, ditch, etc., "and that they have good right and full power and authority to convey" the property above described; *provided* always, "that if the said parties of the first part," their heirs, etc., shall well and truly pay, etc., "according to the condition of a bond bearing even date herewith," then this conveyance to be void; "and in case of default of payment it shall be lawful for the said party of the second part to proceed to foreclose accord-

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ing to law, and make public sale of said ditch and flume and all and every of the rights of the said parties of the first part acquired (therein) by said charter, and the work and improvements done and to be done under and by virtue of said charter, to acquire and maintain the rights guaranteed thereby, and out of the proceeds to pay," etc. "In witness whereof, the said parties of the first part have hereunto set their hands and affixed their seals, the day and year first above written.

"W. P. POOL, [L.S.]

"C. W. TOZER, [L.S.]

"GEO. T. TERRY, [L.S.]

"JNO. REID, [L.S.]

"In presence of

"SAMUEL A. DUVAL,

"CHARLES MCLEAN."

The bond given with the mortgage nowhere mentions or refers to the corporation.

Crockett & Crittenden, for Appellant.

I. The mortgage was executed by the President, Directors, and stockholders of the company to Steele, and was the mortgage of the company, and not simply the mortgage of the individual persons who signed it, because—

1. It is signed and executed by all the officers of the company who describe themselves as such. It is evident they acted in their official capacity, and when this is apparent on the face of the paper it is a corporate act in whatever name it may be done. In grants by corporations a misnomer of the corporation is immaterial and the grant is valid, provided it appears to have been made as a corporate act. (*Angel & Ames on Corp. Secs. 99, 185, 231.*)

2. That this mortgage was intended to be a corporate act is apparent from the fact: 1st, that it is made by all the officers and members of the corporation who describe themselves as such; 2d, it purports to convey, not the interest of the parties to the instrument in the corporate property, but the whole of the corporate property itself; 3d, the grantors covenant that they have good right and full power and authority to convey the same; 4th, that

upon a breach of the conditions the mortgagee shall have a right to sell the property, all the rights of the said parties of the first part acquired by the charter, and to "acquire the rights guaranteed thereby;" 5th, it is evident from the proofs that the whole original object and intent of the mortgage was to raise money for the use of the corporation, and the shareholders united in it only for the purpose of placing it beyond doubt that the holder of the mortgage would have the best possible security upon the corporate property and franchises; 6th, the money advanced by Steele upon the mortgage was advanced to and used by the corporation.

These facts render it apparent that it was intended as a corporate act, and enough appears on the face of the paper to make that intention plain. But if not apparent on the face of the paper the parol proof places it beyond doubt, and such proof is competent for that purpose.

II. It does not appear that the corporation had a corporate seal. It might adopt any seal for the occasion. The case of *Mill Dam Foundry Co. v. Hovey* (21 Pick. 417) is directly in point. In that case the instrument was signed by the Treasurer of the corporation and the other party to the contract, and concluded as follows: "In witness whereof, we have hereunto set our hands;" then followed the signatures, at the end of each of which was a wafer and a small bit of paper stamped with a common desk stamp of a merchant. It was objected that this was not the seal of the company; but the Court decided otherwise, and says a corporation may adopt any seal and need not say it is their common seal. This law is as old as the books. Twenty may seal at the same time with one seal. (See also *Reynolds' Heirs v. Trustees*, 6 Dana, 37.)

III. No vote of the corporation was necessary to authorize the mortgage to be made, because the authority to execute it is manifest from the fact that all the corporators united in it; and though it was executed without authority by the President or any officer of the corporation, it became valid as a corporate act if the corporation afterwards assented to it, and such assent may be proven by circumstances. (*Burrill v. President of Nahant Bank*, 2 Met. 163; *Decker v. Freeman*, 3 Greenl. 388.) That such ratification will bind the company, and may be inferred from subse-

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quent acts of the corporation, is established by the cases of *Shaver v. Bear River and Auburn Co.* (10 Cal. 396); *Moss v. Rassie Lead Co.* (5 Hill, 137); *Hoyt v. Thompson* (19 N. Y. 207); *Partridge v. Badger* (25 Barb. 146).

IV. If the mortgage was not literally and in terms the mortgage of the corporation, yet if it was so intended and so treated by the corporation and the mortgagee, and if on the faith that it was obligatory on the corporation, the mortgagee, Steel, advanced his money, and the corporation accepted and used the money for corporate purposes, the company is estopped in a Court of Equity to deny its validity as a corporate mortgage. (*Central Bank v. Empire Co.*, 26 Barb. 23.)

In a Court of Equity an absolute deed will be treated as a mortgage, when it was so intended; and it would be a fraud upon the mortgagee for the company to deal with him and obtain his money, on the faith that it was a valid corporate mortgage, and afterwards repudiate it. "Mortgages may be implied in equity from the nature of the transactions between the parties, and then they are termed equitable mortgages." (Story's Eq. Secs. 1020, 1018.)

Whatever may be the form of the instrument, it will be held in equity to be a mortgage, if so intended by the parties. (Story's Eq. Sec. 1018.)

And equity will establish a lien on real estate whenever that is the agreement, at least as against the party himself and third persons who are volunteers, or have notice. (Story's Eq. Secs. 1231, 1232.)

H. O. & W. H. Beatty, for Respondent.

The terms of the mortgage preclude the idea of its being a corporate act. Instruments having much more the semblance of corporate acts, have been passed on by the Courts, and have been pronounced not to be corporate deeds.

The Courts have uniformly held that, however full the authority of the agent, however ample his authority may have been to affix the corporation seal, or a corporation seal, still, if he affixes a seal which he calls his seal, the deed is not the deed of the corporation, and if any suit is brought upon the contract contained in the deed, the suit must be in assumpsit and not in covenant.

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Parsons on Contracts (Vol. 1, p. 94, note *f*), uses the following language: "An instrument to which the agent of a corporation has affixed his seal may be evidence of the contract in an action of assumpsit against the corporation, for the seal of the agent of the corporation, unlike that of the agent of a natural person, can never be the seal of his principal." (See, also, *Randall v. Van Vecken*, 19 Johns. 60; *Damon v. Inhabitants of Granbey*, 2 Pick. 345; *Bank of Columbia v. Patterson's Administrator*, 7 Cranch, 299.)

The case of *Brimley v. Mann* (2 Cush. 337), where a deed was executed by the agent of the corporation, is a very strong one, and fully in point.

Not only could the corporation deny the validity of this mortgage, or its binding effect upon them, but any creditor of the corporation, interested in its assets, could deny that it was a corporate mortgage and resist its legal enforcement. (1 Pars. on Con. 118.)

COPE, C. J. delivered the opinion of the Court, NORTON, J. and CROCKER, J. concurring.

This is an action to recover a sum of money secured by a bond and mortgage, claimed to have been executed by a corporation known as the Scott River Water and Mining Company. The plaintiff alleges that the corporation, by its President and Directors, executed the bond and mortgage in question, and asks a foreclosure of the mortgage, and a sale of the mortgaged property, etc. The defendants deny that the bond and mortgage were executed by the corporation, and resist the claim of the plaintiff to the relief asked.

There is no doubt that the debt for which the bond and mortgage were given was the debt of the corporation, but we are of opinion that the bond and mortgage cannot be enforced as corporate obligations. The bond purports to be the individual obligation of the persons signing it, and the corporation is nowhere named as a party to it, either directly or by the use of language tending to show that it was a corporate transaction. It is signed by four persons, who neither describe themselves as agents of the corporation, nor designate the corporation as the party intended to be bound by it, and we think that extrinsic evidence is not admissible

to change the character of the instrument. If its construction were doubtful, such evidence might be resorted to for the removal of the doubt, but it is not admissible to show that the effect of the instrument is different from that which its terms plainly and unequivocally denote.

The mortgage is signed by the same persons who signed the bond, and although differing from the latter in the fact that the corporation is mentioned in the body of it, its execution cannot be regarded as a corporate act. It names as parties of the first part William P. Pool, Charles W. Tozer, George T. Terry, and John Reid, "President, Directors, and members of the Scott River Mining Company," and concludes as follows: "In witness whereof the said parties of the first part hereunto set their hands and affix their seals." Then come the signatures of the parties, to each of which is appended a scroll or seal; but the seals thus appended are the private seals of the parties signing, and not the common seal of the corporation. The clause referred to is conclusive of this point, and as the corporation could only convey under its corporate seal, the mortgage is necessarily inoperative as the foundation of any right or claim to the corporate property. A corporation may alter its seal at pleasure, and may adopt as its own the private seal of an individual if it choose to do so, but when adopted it must be used as the seal of the corporation. If it be affixed as the seal of the individual, it cannot be treated as that of the corporation, and a declaration in the instrument that it is so affixed is conclusive of its character and effect. "If a conveyance," says Parsons, "purporting to be the conveyance of a corporation, made by one authorized to make it, be in fact executed by the attorney as his own deed, it is not the deed of the corporation, although it was intended to be so, and the attorney had full authority to make it so. And if the deed be written throughout as the deed of the corporation, and the attorney when executing it declares that he executes it on behalf of the corporation, but says, 'in witness whereof I set *my hand and seal*,' this is his deed only, and does not pass the land of the corporation." (1 Par. on Con. 118.) The same rule is laid down by Angell & Ames in their work on corporations, and there are numerous cases in which the point has

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been judicially determined. The case of *Brimley v. Mann* (2 Cush. 337) covers the entire ground, holding that a deed executed by the agent of a corporation, and purporting to be the deed of the corporation, was not so in fact, as it was signed by the agent in his own name, *and sealed with his seal*. The seal of the agent is not a seal as regards the corporation, and where the seal is attached to a conveyance as that of the agent, the conveyance is the conveyance of the agent and not of the corporation. It is unnecessary to state in the conveyance that the seal used is that of the corporation, if the fact otherwise appear, either presumptively from the language of the conveyance, or by evidence *aliunde*. The fact must appear, however, in some manner, and where the conveyance itself declares the seal to be that of the agent, there is no room for any presumption or inquiry upon the subject.

Judgment affirmed.

COOK v. DAVIS *et al.*

M. & T. being indebted to V. in the sum of six hundred and seventy-one dollars, plaintiff, for the accommodation of the debtors, procured E. to assume the debt and execute to V. his (E.'s) note for the amount, and to secure E. plaintiff assigned to him a note and mortgage of M. for \$2,000, with an agreement that the latter should be re-transferred to plaintiff upon the payment by him to E. of the amount of his (E.'s) note to V. Subsequently, E. died, having in his hands at the time \$1,400 belonging to M., and received by E. as rents and profits of a certain ditch of which he and M. were joint owners. Defendants were appointed administrators of E. and received the \$1,400 as assets of deceased, and afterwards from the funds of the estate paid the six hundred and seventy-one dollar note to V. The action is brought to compel defendants to re-deliver to plaintiff the \$2,000 note and mortgage, he claiming that the transaction above stated amounted to a payment by him of the debt for which they had been pledged as security: *held*, that the facts did not show a payment of E.'s note to V. by plaintiff; that they only established that there was a balance due to M. from the estate of E., and that plaintiff was not authorized in this action to avail himself of such counter claim of M. against the estate as a payment on behalf of M. & T.

APPEAL from the Ninth Judicial District. *

The complaint avers:

That April 1st, 1859, one C. M. McKinney executed to plaintiff

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his note for \$2,000, secured by mortgage. That May 23d, 1859, McKinney and one N. A. Townsend were indebted to H. I. Van Horn in the sum of six hundred and seventy-one dollars, and they not being able to pay the same, plaintiff, to assist them, at their request and for their accommodation, procured W. H. Ellmore to assume the debt to Van Horn, and to execute to the latter (upon his releasing McKinney & Townsend) his promissory note for the amount. That to secure Ellmore, plaintiff assigned to him the \$2,000 note and mortgage of McKinney, upon a written agreement that the latter note and mortgage should be redelivered to plaintiff upon his payment to Ellmore of the amount of the note executed by the latter to Van Horn. That about the first of July, 1859, plaintiff, by the hands of McKinney, paid to the personal representative of Ellmore (then deceased) the amount of the six hundred and seventy-one dollar note made by deceased to Van Horn, and thereby became entitled to the possession of the McKinney note and mortgage. That Ellmore died June 25th, 1859, and defendants are his administrators. That defendants refuse to deliver to plaintiff the McKinney note and mortgage, and under an order procured by them from the Probate Court, are about to sell the same as property belonging to the estate of their intestate. Plaintiff prays that the sale may be enjoined, and that defendants be ordered to cancel the assignment of the note and mortgage, and redeliver them to plaintiff.

The answer admits the averments of the complaint, except the allegation that plaintiff has paid the amount of the note made by Ellmore to Van Horn, which is denied.

The Court before whom the case was tried without a jury found as a fact, that before Ellmore's death he had become a joint owner and partner with McKinney in a certain water ditch, and that by an agreement between them he, Ellmore, had been for some time in the exclusive possession and receipts of the rents and profits, which latter he was by the terms of the arrangement, to apply to the payment of a debt due to him from McKinney, until it should be thus satisfied; that at the date of Ellmore's death the rents and profits so received by him amounted to some \$1,400 more than enough to satisfy McKinney's debt, and that this surplus, properly

belonging to McKinney, had been received by defendants with the other property of the estate, as Ellmore's administrators, and had never been paid by them to McKinney; that about the first of January, 1860, defendants, as administrators, paid from moneys in their hands, belonging to the estate, the note executed by Ellmore to Van Horn for the indebtedness due the latter from McKinney & Townsend. From these facts the Court further found, that the reception by the administrators of the rents and profits belonging to McKinney, and the payment by them of the Van Horn note from the funds of the estate amounted to a payment of said note by McKinney for the plaintiff, and was equivalent to its payment by the latter, according to the agreement between him and the deceased. As a conclusion of law, the Court found that plaintiff was entitled to the relief prayed for, and entered judgment accordingly.

Defendants moved for a new trial, which was denied, and from this order and the decree they appeal.

E. Garter, for Appellants.

J. D. Mix, for Respondent.

NORTON, J. delivered the opinion of the Court—COPE, C. J. concurring.

There is no evidence to sustain the averment of the complaint, and the finding of the Court, that Cook paid to Ellmore or his personal representatives the amount of the note given by Ellmore to Van Horn. The proof at most only shows that there is a balance due from the estate of Ellmore to McKinney, equal to or more than the amount which the estate has paid for the benefit of McKinney & Townsend. McKinney & Townsend are not parties to this action, nor is there any case presented by the complaint which would authorize Cook to avail himself of the counter claim of McKinney against the estate of Ellmore as a payment in behalf of McKinney & Townsend.

The judgment must be reversed and cause remanded for a new trial.

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THE competency of a witness whose interest has been created by his execution, as surety, of a statutory undertaking made on behalf of one of the parties for the purposes of the action, may be restored on the trial, either by the substitution of another surety upon the undertaking, or by a deposit in Court of a sufficient sum of money to cover all liability attaching to the proposed witness by reason of his suretyship.

Alleged errors in findings of fact, will not be considered where the findings themselves are immaterial to the decision.

An affidavit of a party that he was surprised at the admission of a witness on the trial because his attorney had advised him that the witness was incompetent, and that he was also surprised by the testimony of the witness in stating a certain conversation incorrectly, is not sufficient to authorize the granting of a new trial on the ground of surprise.

Where, during the progress of a trial, the existence or the materiality of absent evidence is first discovered, the party desiring such evidence should move for a continuance until it can be obtained, and failing to do this, he cannot have a new trial on the ground that the evidence was newly discovered.

A new trial will not be granted because of the discovery of new evidence which is merely cumulative, and which, if produced, would only tend to contradict a witness of the opposing party.

APPEAL from the Fifteenth Judicial District.

The facts are sufficiently stated in the opinion.

C. E. Wilkins, for Appellant.

I. The Court below erred in allowing the release of witness C. B. Kimball, he being liable to pay plaintiff any judgment that he (plaintiff) might recover in the action. (Prac. Act, Secs. 123, 137; 1 Green. Ev. Secs. 426, 427.)

II. The Court erred in its finding of facts, that the note was paid by plaintiff, instead of being purchased. (*Williams v. Hall*, 9 Gill, Md. 347.) There is nothing in the testimony to show that plaintiff and Pierson ever had any conversation, except as to extension of time, and that is without consideration. (*Williams v. Covillaud*, 10 Cal. 419; *McCann v. Lewis*, 9 Id. 246.)

III. The Court erred in its conclusions of law, that the defendants Bliss and Thompson are not liable and that Pierson is, as there is no distinction between maker and surety, even if plaintiff knew

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they were sureties. (*Aud v. Magruder*, 10 Cal. 282; *Kitzer v. Mills*, 9 Id. 21.) Possession of a note, either before or after maturity, is *prima facie* evidence of ownership. (2 *Seldon*, N. Y. 209; *McCann v. Lewis*, 9 Cal. 246.)

IV. The Court erred in refusing plaintiff a new trial on the ground of newly discovered evidence, as shown by affidavits. (Prac. Act, Sec. 193.)

Belcher & Belcher, for Respondents.

The Court below rightly overruled the motion for a new trial.

I. The interest of C. B. Kimball was removed by the deposit of money made by the defendants with the clerk. (1 *Green. Ev. Secs.* 392, 431, and notes; 3 *Phil. Ev.* 38, and *Cowen & Hill's Notes* thereto, 629.)

II. The findings of the Court were right upon the testimony submitted at the trial. The testimony showed that Klockenbaum furnished the money to Pierson to pay the note, and that the other parties to it were thereby released. (Story on Promissory Notes, Sec. 180.) If the testimony was conflicting upon this point, still this Court will not disturb the judgment.

III. The affidavits filed did not authorize the Court to grant a new trial, because—

1st. Klockenbaum might have had his alleged newly discovered evidence at the trial. Want of recollection is no excuse. (*Bond v. Cutter*, 7 *Mass.* 205; 1 *Graham & Waterman's New Trials*, 472, *et seq.*)

2d. The alleged newly discovered evidence is cumulative. Plaintiff sued as indorsee, and was required to prove at the outset his purchase of the note; and

3d. The alleged newly discovered evidence is sought to be used only to discredit the witness Kimball. (1 *Graham & Waterman's New Trials*, 495 *et seq.*; *Bartlett v. Hodgdon*, 3 *Cal.* 57; *Brooks v. Lyon*, Id. 114; *Live Yankee Co. v. Oregon Co.*, 7 *Id.* 42; *Baker v. Joseph*, 16 *Id.* 180.)

CROCKER, J. delivered the opinion of the Court—COPE, C. J. and NORTON, J. concurring.

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This is an action brought by the plaintiff upon a promissory note executed by Pierson, Bliss, Thompson, and McDuffie, as the makers, and Kimball as indorser. Bliss, Thompson, McDuffie, and Kimball defend the action, claiming that the note was made for Pierson's benefit, and that they were only sureties and indorsers for him, and that the plaintiff, instead of being a purchaser of the note, paid the same for Pierson, under a promise from Pierson that he would give him a new note with the same persons as sureties. Judgment was rendered in favor of Bliss, Thompson, McDuffie, and Kimball, against the plaintiff, who moved for a new trial, which was denied, and he takes this appeal from the judgment and the order overruling the motion for a new trial.

On the trial the defendants offered one C. B. Kimball as a witness, and plaintiff objected to his testifying on the ground that an attachment had been issued in the action, and a bond had been given to release the property from the attachment, and the witness was one of the sureties on that bond, and therefore interested. The defendants then applied to the Court for leave to substitute another surety on the bond in place of the witness. The Court refused to allow the substitution, but permitted the defendants to deposit with the Clerk the full amount of the bond in lieu thereof, and then permitted the witness to testify, to which the plaintiff objected and excepted, and this is the first error assigned. A witness who is rendered incompetent because of his being surety on a bond given in the action, as in the present case, can be rendered competent, either by substituting another surety, or by deposit of a sufficient sum of money. (1 Greenl. Ev. Sec. 392, note 3, 430, citing numerous authorities; 3 Phillips' Ev. C. H. & E.'s Notes, 38, note 629.) The money deposited in Court is certainly a better security to the plaintiff than any bond could be. There was no error in this action of the Court.

The next assignment of error is, that the Court erred in finding as a fact that the plaintiff paid the note for Pierson instead of purchasing it, and that this finding is contrary to the evidence. There seems to be sufficient evidence to sustain the finding. The evidence is not very clear or positive whether the money paid by the plaintiff was by the way of payment or a purchase, but we think it preponderates in favor of the finding, and we shall not disturb it.

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The appellant also objects to several other findings of the Court, as not sustained by the evidence. Some of these findings have very slight evidence to support them, but they are not very material to the case. The principal fact found, that the money paid by the plaintiff was a payment of the note, and not a purchase, renders the other findings objected to entirely immaterial. That fact alone defeats the plaintiff's right to recover against the contesting defendants. Pierson did not answer or contest the suit, and judgment was rendered against him in favor of the plaintiff, and he does not appeal therefrom.

The last assignment of error is that the Court erred in refusing to grant the plaintiff a new trial on the ground of newly discovered evidence and surprise. Plaintiff states in his affidavit on this point that he was surprised at the admission of C. B. Kimball as a witness, as his attorney had advised him that he could not be admitted, and he was further surprised at the testimony given by Kimball on the trial, as he stated the conversation between them entirely different from what he understood it. The plaintiff has not shown sufficient in his affidavit to entitle him to a new trial on the ground of surprise. (*Brooks v. Lyon*, 3 Cal. 113; *Taylor v. The California Stage Company*, 6 Id. 230; *Packer v. Heaton*, 9 Id. 571; *Fuller v. Hutchings*, 10 Id. 526.) The newly discovered evidence is set forth in the affidavit of one Anderson, who states that he was present at the conversation between the plaintiff and C. B. Kimball, and respecting which Kimball testified on the trial, and then gives his recollection of the conversation. The plaintiff gives, as a reason why he did not procure the attendance of Anderson at the trial, that he did not recollect that Anderson was present at the conversation until he heard Kimball state the fact in his evidence. The plaintiff fails to show proper diligence, and the new evidence is merely cumulative, and would only tend to contradict the witness of the defendants. When he was brought to recollect that Anderson was present at the conversation spoken of, then, if he desired his testimony, he should have applied to the Court to continue the case, to enable him to procure it. (3 Cal. 57, 114, 399; *Taylor v. California Stage Co.*, 6 Id. 230; *Live Yankee Co. v. Oregon Co.*, 7 Id. 42; *Berry v. Metzler*, Id. 418; *Baker v. Joseph*, 16 Id. 180.)

The judgment is affirmed.

WOODWORTH v. KNOWLTON.

A COMPLAINT, in an action to recover personal property, averred that the plaintiff was the owner and possessor of the property at the time of the taking by defendant. The answer denied this allegation, and in addition averred affirmatively, that the property was at that time, owned and possessed by a third person: *held*, that this averment was but another form of denial and not new matter which, under the system of replication formerly in force, was admitted by a failure to reply.

Where an allegation in a verified complaint embraces several distinct propositions, stated conjunctively, a denial, in the answer, of the entire allegation, following the language of the complaint, is insufficient and raises no issue.

Thus where the form of the allegation was that defendant "unlawfully and wrongfully seized and took said property into his possession from said plaintiff," and the denial was "that he (defendant) wrongfully and unlawfully seized, took, or carried away the said property:" *held*, that the fact that defendant took the property from the plaintiff was not denied but admitted.

Certain personal property owned by plaintiff, but which had been used by A. & G. under a contract of hire, was seized by the Sheriff from the possession of the plaintiff by virtue of an attachment against G., subsequent to which plaintiff having made a demand for the property upon the Sheriff, but not upon A. & G., commenced this action against the former for its recovery: *held*, that the demand, if necessary at all, was properly made upon the defendant in whose possession the property was at the time.

APPEAL from the Fourteenth Judicial District.

The facts are stated in the opinion.

D. Belden, for Appellant.

I. The defendant's answer alleges possession and right of possession in Griffin of the property, and this is not denied in the replication.

II. In replevin the plaintiff must show affirmatively, that at the time of the alleged caption, he was entitled to the immediate possession of the property taken. (2 Greenl. Ev. 531; 3 Wend. 242; 20 Johns. 469; 3 Hill, 576; 4 Duer, 202; 1 Sanford, 32; 3 Pick. 255; 15 Id. 65.)

Says the Supreme Court of New York in speaking of replevin under the code: "The action of replevin under the code takes the place of replevin as regulated by the revised statutes, and makes it a substitute for detinue and a concurrent remedy for

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trespass and trover, when defendant is in possession of the goods. (*Brochway v. Burnap*, 12 Barb. 252.)

And in each of the forms of action now comprised in replevin, the right to immediate possession upon the part of plaintiff, was absolutely essential.

(In detinue see *Milton v. McDonald*, 2 Miss. 45; 1 Chitty's Pleadings, 122; Bouvier's Dictionary, title Detinue. And in trespass, to the same point, see 2 Greenl. 512; *Hoyt v. Gelson*, 13 Johnson, 141; *Hind v. West*, 7 Cowen, 752; *Orser v. Storms*, 9 Id. 687; *Aiken v. Buck*, 1 Wend. 466; *Root v. Chandler*, 10 Id. 112.)

In trover the same right of possession must be shown in plaintiff. (*Middleworth v. Sedgwick*, 10 Cal. 393; *Bush v. Lyon*, 9 Cow. 55; *Wheeler v. Train*, 3 Pick. 255; 2 Greenleaf's Ev. title Trover.)

III. A general hiring of chattels which does not fix the price to be paid, or the term of the hiring (as in this case), is, in law, a contract for a reasonable price, and for such period as both parties please, to be terminated only by demand, and both property and right of possession are for the time being out of the lessor. (*Smith v. Homer*, 15 East. 607; *Ayers v. Bartlett*, 9 Pick. 156; *Fairbanks v. Phelps*, 22 Id. 538.)

Such a contract is not terminated, nor the right of possession restored to the lessor by a demand made by the lessor upon the Sheriff, or one acting adversely and under some supposed derivative title in law from the lessee. (15 East. 607; *Ayer v. Bartlett*, 9 Pick. 156; *Fairbanks v. Phelps*, above cited; *Ford v. Higby & Irwin*, 10 Cal. 449.)

In all these cases the Court held that a hiring for an indeterminate time must be terminated by a demand upon the lessee or by some act between the parties themselves, and not by the adversary act of a stranger, and that until the contract was so determined the right of possession necessary to maintain replevin was out of the lessor.

Thomas P. Hawley, for Respondent.

I. No demand upon Atherton & Griffin, for the property, was necessary to enable plaintiff to maintain this action.

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The estate of Griffin & Atherton, in the coach and horses, was a bare possession and use by sufferance of plaintiff, and required no demand to divest it. Possession by indulgence of the owner is constructive possession of such owner. (*Walcot v. Pomeroy*, 2 Pick. 122; *Morgan v. Ide et al.*, 8 Cush. 423.)

“The possession of a lessee at will is the possession of the lessor.” (Com. Digest, title Trespass, V, 2; 2 Green. on Ev. Sec. 614; *Putney v. Wyley*, 8 Johns. 432; *Morgan v. Ide*, 8 Cush. 423.)

It is also a well settled rule of law, that the general property of personal chattels draws to it the possession. (2 Pick. 122; *Daniel v. Pond*, 21 Id. 371; *Thorp v. Burling*, 11 Johns. 286; *Hubbel v. Rochester*, 8 Cow. 115; *Foster v. Gorton*, 5 Pick. 186; 7 Tenn. 12; 2 Saunders, 47, note.)

If any demand was essential before suit brought, it was a demand of the Sheriff after caption, and such a demand was made by plaintiff.

II. The averment in the answer as to right of possession in Griffin was not new matter and required no reply. The complaint alleged that plaintiff was the owner of and entitled to the possession of the property in question. The answer denied the allegation of ownership and right of possession as set forth in plaintiff's complaint, and alleged adverse ownership and right of possession in Griffin, thus putting in issue the ownership and right of possession and rendering further allegations to such point superfluous. The allegation in the answer was responsive to the allegation in the complaint, and was not new matter requiring a denial in the replication. (*Frisch v. Calen*, 21 Cal. 71.)

III. Under the statute of this State either ownership or right of possession is sufficient to enable plaintiff to maintain his action. The right of immediate possession in the owner of the property is not really essential to enable such owner to maintain replevin against a stranger for an injury to his reversionary interest. (*Kuhland v. Sedgwick*, 17 Cal. 127.)

No adverse or intervening estate or interest in or to the property was shown in Griffin & Atherton other than a mere bailment at will of plaintiff, hence the rule “that the general property draws to

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it the possession where there is no intervening adverse right of enjoyment," applies to this case. (See 2 Greenl. Ev. Sec. 614, and cases before cited.)

Where the bailment is at the will of the owner and he can at any time take the property into his own hands at pleasure, in such case he can maintain trespass as for an injury to his own actual possession, and this proof will support the averment. (1 Chitty on Plead. 9, 169; *Lotan v. Cross*, 2 Camp. 464; *Hubbell v. Rochester*, 8 Conn. 115; *Hingham v. Sprague*, 15 Pick. 102; *Starr v. Jackson*, 11 Mass. 519; *Walcott v. Pomeroy*, 2 Pick. 122; *Woodruff v. Halsey*, 8 Id. 333; *Morgan v. Ide et al.*, 8 Cush. 423.)

Trespass *de bonis* and replevin are concurrent remedies. (*Allen v. Crary*, 10 Wend. 349; 1 Mason, 322; *Stewart v. Wells*, 6 Barb. 79; 10 Johns. 373.) For any wrongful taking of goods for which trespass could be maintained replevin lies. (*Hopkins v. Hopkins*, 10 Johns. 369; *Paughbrun v. Partridge*, 7 Id. 140; *Dunham v. Wyckoff*, 3 Wend. 280.)

Possession of a lessee at will is the possession of the lessor, and no demand is necessary to be made upon such lessee for the delivery of the property before suit can be maintained by the lessor against a third person for the wrongful taking or detention thereof. (*Woodbury v. Long*, 8 Pick. 544; *Boise v. Knox*, 10 Met. 40; *Thurston v. Blanchard*, 22 Pick. 20.)

CROCKER, J. delivered the opinion of the Court—COPE, C. J. and NORTON, J. concurring.

This is an action for the possession of certain personal property, to wit: a coach and eight horses. Woodworth, the plaintiff, a livery stable keeper, let Griffin & Atherton use the property, and they agreed to pay for the use of the same by the following instrument of writing executed by them:

"GRASS VALLEY, August 4th, 1861.

"This is to certify that we agree to pay to B. F. Woodworth six dollars per day for the use of eight horses and a coach to run between Boston Ravine and Nevada.

"J. P. ATHERTON,

"A. GRIFFIN."

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On the twenty-third day of October, 1861, Knowlton, as the Sheriff of Nevada County, attached the coach and horses as the property of Griffin, under and by virtue of a writ of attachment in his hands for service. The plaintiff recovered judgment in the District Court. A motion for a new trial was denied, and the defendant appeals to this Court.

The proceedings in this case were had during the existence of the statute requiring a replication to new matter set up in the answer. In this case the complaint averred that the plaintiff was the owner and entitled to the possession of the property in question; the answer denies this averment, and avers that at the time of the levy upon the property, it was the property in the possession of and owned by Griffin. Appellant avers that this is new matter in the answer, and is admitted to be true, not being denied in the replication. An examination of the record discloses the fact that it is directly denied in the replication; but even if it had not been, these averments in the answer are not new matter within the meaning of the statute. It is but another form of denial of plaintiff's ownership and right of possession set forth in the complaint. (*Frisch v. Caler*, 21 Cal. 71.)

Appellant also contends that plaintiff did not show that he was entitled to the possession of the property at the time of the commencement of the action, because he did not prove any demand of Atherton or Griffin for the property; that they held the property as lessees; that their right of possession as such lessees could not be terminated without a special demand upon them. The pleadings in this case are verified, and the complaint avers that the plaintiff was, on the day of the taking, the owner of and entitled to the possession of the property, and that the defendants "unlawfully and wrongfully seized and took said property into their possession from said plaintiff," etc. The answer denies "that he wrongfully and unlawfully seized, took, or carried away the said property," etc. This is no denial of the fact that he seized and took the property from the plaintiff; it is a mere denial that it was wrongfully or unlawfully done. (*Kuhland v. Sedgwick*, 17 Cal. 123; *Caulfield v. Sanders*, Id. 569; *Higgins v. Wurtell*, 18 Id. 330; *Busonius v. Coffee*, 14 Id. 92; *Blankman v. Vallejo*, 15 Id. 644.) The

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pleadings, therefore, admit that the defendant took the property from the plaintiff, and this seems to be sustained by the evidence of Atherton, who says: "I saw the property, before it was attached, in Woodworth's stable." The evidence and pleadings show clearly that the plaintiff was the owner of the property, and in possession at the time of the levy of the attachment, and we see nothing in the evidence showing a right of possession in any person other than the plaintiff at the time of the commencement of the suit. The attachment gave the defendant no authority to take property owned by the plaintiff, and his seizure of the property was therefore wrongful and unlawful. If any demand whatever was necessary in this case, which is not very clear, it was sufficient to make that demand of the party in actual possession, and who was able to comply with it, and it would have been but an idle ceremony to make a demand of Atherton or Griffin, who could not have complied with it had they been willing to do so.

Judgment affirmed.

BRADLEY *et al.* v. KENT.

THE "amount in controversy," which, in actions on contract, determines the jurisdiction of a Justice's Court, is the principal sum sued for exclusive of costs.

A Justice's Court, or a County Court on appeal from a Justice's Court, does not necessarily exceed its jurisdiction by rendering a judgment for more than two hundred dollars. The judgment may exceed the "amount in controversy" upon which alone the jurisdiction depends.

The provisions of Sec. 422 of the Practice Act, authorizing parties to be examined as witnesses on their own behalf, are applicable to Justices' Courts.

A notice for a party to testify, under Sec. 22 of the Practice Act, while it need not set forth all the evidence, or each particular fact, upon which the party intends to be examined, must specify each particular subject matter respecting which he intends to testify with a reasonable degree of certainty and particularity. It is insufficient to merely refer to the issues or the allegations of the pleadings.

A notice for a party to testify, stated the points as follows: "And the points upon which it is intended to examine said Charles Kent, defendant, on said trial will be on every issue made by complaint and answer now on file in said cause, and every allegation contained in plaintiffs' said complaint denied by

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defendant's answer, and particularly concerning the matters alleged by plaintiffs on transfer of note to Charles Kent by Vandiven, also all the allegations made by plaintiffs concerning protest, demand, presentment, and notice, and averred waiver of demand, denied by defendant: *held*, that the notice was too uncertain and indefinite to authorize any examination of defendant on his own behalf.

APPEAL from the County Court of Nevada County.

The facts are sufficiently stated in the opinion.

Harmon & Hartly and *J. J. Caldwell*, for Appellant.

I. The Court erred in refusing to allow Charles Kent to testify on the trial in said cause. (Prac. Act, Secs. 422, 620; 1 Bouv. Law Dict. defining "Point;" New York Prac. Sec. 399; *Fallan v. Kus*, 8 How. Pr. 341; *Benham v. The New York C. R. Co.* 13 How. 198; *Clement v. Adams*, 1 Id. 166; *Collins v. Knapp*, 18 Barb. 532; *Gabble v. Kung*, 11 How. 248; *Farly v. Flanagan*, 1 Smith, 313; *Bushill v. Gwyam*, 2 Abbot, 79.)

II. The Court erred in rendering a judgment for the sum of two hundred and four dollars for the reason said Court has not jurisdiction over the subject matter of the judgment. (*Fillett v. Engler*, 8 Cal. 76; *Black v. Herrick*, 5 Id. 279; *Zander v. Coe*, Id. 230; *Hart v. Moon*, 6 Id. 161; *Freeman v. Powers*, 7 Id. 104.)

John Garber, for Respondent.

I. The sum claimed in the declaration or complaint, and not the judgment rendered, is the test of jurisdiction. (3 Ind. 548; *Middleton v. Hawes*, 6 Blackf. 397; *Swift v. Woods*, 5 Id. 97; *Wetherill v. Inhabitants, etc.*, Id. 357; *Barnum v. Small*, 4 Ind. 50; *Strong v. Daniels*, 3 Mich., Gibbs, 466; *Bridge v. Ballew*, 11 Texas, 269; *Pharis v. Carver*, 13 B. Mon. 236; *Ballinger v. Ford*, 14 Barb. 250; *Fenton v. Harred*, 17 Penn. 158; 1 Morris, 316; *Sherma v. Clark*, 3 McLean, 91; *Yager v. Hannah*, 6 Hill, 631; *Butler v. Potter*, 17 Johns. 145.)

In this case the sum claimed, exclusive of interest, is less than two hundred dollars—the defendant appeared—so the Court acquired jurisdiction both of the subject matter and of the person.

II. The notice for a party to testify must be more specific than the pleadings. A notice that defendant will be examined on all the matters in issue is clearly insufficient, for a mere notice of the intention to testify would give the same information.

No witness in any case can testify except upon the issue joined. The *allegata* and *probata* must always correspond, and to hold such a notice sufficient would be to render nugatory that part of the statute which requires the points to be specified. The object of the statute would be best effected by requiring the notice to contain the proposed evidence in full. But this notice is insufficient under a much less stringent construction. The specification must at least be as definite as in a bill of particulars. (*Pattison v. Johnson*, 15 How. Pr. 289; *Wiggins v. Gans*, 3 Sand. 738; *Conor v. Hutchinson*, 17 Cal. 279; see also *Falon v. Keese*, 8 How. Pr. 841; *Benham v. New York Cen. R. Co.*, 13 Id. 198.)

CROCKER, J. delivered the opinion of the Court—COPE, C. J. and NORTON, J. concurring.

This action was commenced in a Justice's Court to recover the amount due on a promissory note for one hundred and ninety-three dollars and thirteen cents, with cost of protest and interest. It was appealed to the County Court, where the plaintiffs recovered judgment for two hundred and four dollars, and the defendant appeals therefrom to this Court.

The appellant contends that the County Court had no jurisdiction to render judgment for a sum exceeding two hundred dollars, and that the judgment in this case is therefore void, and refers to the case of *Fillett v. Engler* (8 Cal. 76). In that case the suit in controversy was commenced before a Justice of the Peace for the sum of two hundred dollars, but the defendant appeared and confessed judgment for three hundred dollars; and the Court held that Justices of the Peace could not entertain suits for money demands "where the amount in controversy exceeds two hundred dollars" and that consent of parties could not extend this jurisdiction. It was not there held that Justices' Courts could not render judgments for sums exceeding two hundred dollars. The "amount in controversy" is what determines the jurisdiction. In this case it was the

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amount of the note, exclusive of interest and costs—that is, one hundred and ninety-three dollars and thirteen cents—and clearly within the jurisdiction of the Justices' and County Courts. The Constitution establishes the jurisdiction of the District Courts over all civil cases "where the amount in dispute exceeds two hundred dollars, exclusive of interest," leaving the Legislature to confer jurisdiction in all such cases where the amount in dispute is two hundred dollars and under, exclusive of interest, upon inferior Courts, and this they have done in the act organizing Courts of Justice (Wood's Dig. 155, Sec. 67) where Justices' Courts are authorized to take jurisdiction "of an action arising on contracts for the recovery of money only, if the sum claimed, exclusive of interest, does not exceed two hundred dollars." (*Zander v. Coe*, 5 Cal. 230.)

The appellant also contends that the County Court erred in refusing to permit the defendant to testify as a witness on the trial of the cause on his own behalf. He claimed the right to be thus examined, under the amendment of Sec. 422 of the Practice Act, adopted in 1861. (Stat. of 1861, 521, 522.) He introduced a notice duly served on plaintiffs' attorney, more than ten days before trial. The notice states the points on which he is proposed to be examined, as follows: "And the points upon which it is intended to examine said Charles Kent on said trial will be on every issue made by complaint and answer now on file in said cause, and every allegation contained in plaintiffs' complaint denied by defendant's answer, and particularly concerning the matters alleged by plaintiffs on transfer of note to Charles Kent by Vandiven; also all the allegations made by plaintiffs concerning protest, demand, presentment, and notice, and averred waiver of demand denied by defendant."

The respondents insist that this amendment to Sec. 422 does not apply to Justices' and County Courts, but in this they are mistaken. Sec. 620 of the Practice Act provides that the provisions of Title XI of that act, so far as consistent with the jurisdiction and powers of Justices' Courts, shall be applicable thereto; and Title XI includes Sec. 422. We see nothing in this section as amended inconsistent with the jurisdiction and powers of these Courts. But the principal ground of objection is to the notice

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itself, that it is not sufficiently specific in its statement of the points on which the party is intended to be examined. The language of the statute is that notice must be given of such intended examination, "specifying the points upon which such party or person is intended to be examined." The statute clearly requires that the points shall be specifically set forth; that is, they are not to be stated in general terms. As to the degree of particularity, we do not deem it necessary to set forth in the notice all the evidence he intends to offer, or each particular fact that he intends to state; but it must set forth each particular subject matter respecting which he intends to testify, with a reasonable degree of certainty and particularity. In fact, attorneys, in drawing notices under this statute, cannot be too particular in specifying the points on which they intend to examine the party. It is entirely insufficient to merely refer to the issues made up by the pleadings, or to the allegations of the pleadings. (*Falon v. Keese*, 8 How. Pr. 341; *Benham v. New York Central Railroad Co.*, 13 Id. 198; *Pattison v. Johnson*, 15 Id. 289.)

Tested by the rule thus laid down, the notice in this case is clearly insufficient, and the Court, therefore, correctly refused to permit the defendant to testify as a witness on his own behalf. It refers entirely to the issues made by the pleadings, and to the allegations in the pleadings. The latter part of the notice refers to allegations of the plaintiffs upon certain matters, without stating whether these are to be found in the pleadings or are mere outside talk. This is entirely too general, uncertain, and indefinite.

For these reasons the judgment is affirmed.

LAWRENCE v. MARTIN.

A CAUSE of action for a malicious prosecution is not assignable.

The recovery of a verdict in an action for a personal tort does not change the character of the claim to a debt which can be assigned.

Costs are only an incident of a verdict, and when the verdict is, from its nature, unassignable an attempt to assign it will not pass the costs.

A judgment rendered upon an unassignable cause of action for a tort is a debt.

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In an action for malicious prosecution the plaintiff, after a verdict in his favor and before judgment, assigned the cause of action and verdict. Judgment having been subsequently entered, defendant was garnisheed under three executions issued on other judgments against the plaintiff, and paid to the Sheriff the amount of the judgment in favor of plaintiff against him, who applied the same upon the executions: *held*, that the assignment was void, and that the payment by defendant to the Sheriff was a satisfaction of the judgment.

APPEAL from the Twelfth Judicial District.

The facts are stated in the opinion of the Court.

E. A. Lawrence, Appellant *in pro. per.*

I. In the following cases, in New York, verdicts in actions of tort were assigned to the attorneys before judgment was entered thereon, and it was held valid. (*Countryman v. Boyer*, 3 How. Pr. 387; *Robinson v. Weeks*, 6 Id. 161; *Nash v. Hamilton*, 8 Ab. Pr. 35; Voorhies' N. Y. Code, Sec. 293.)

Countryman v. Boyer is a case like the present, wherein all the points in this case are fully discussed, the authorities cited, and the decision in our favor.

In *Nash v. Hamilton* the only point raised was whether verdict in an action of slander could be assigned to the attorney before judgment: *held*, upon full review of the authorities, and upon the authority of the foregoing cases, and also of *Stanton v. Thomas* (24 Wend. 70), and *The People v. Tioga Com. Pleas* (19 Id. 73), to be assignable.

So in England it has been repeatedly held in cases arising under the Bankruptcy Act, that in actions of tort, "where the verdict was before, the judgment after, the bankruptcy, the judgment has relation to the time of verdict, and the certificate will bar the debt." (*Ex parte Charles*, 16 Ves. Ch. 256; see, also, *Lanford v. Ellis*, *ex parte Hill*, 11 Id. 646; *Robinson v. Vale*, 9 Eng. Com. Law, 231; *Kane v. Dulex*, 3 E. D. Smith, 127; Pr. Act, Sec. 16; 1 Bur. Pr. 281, 282.)

At any rate, the bill of costs, one hundred and twenty dollars, had been filed at the time of the assignment, and they were embraced in the assignment, and it required no judgment to make them a debt at that time, and assignable. (*Ex parte Hill*, 11 Ves.

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646.) Martin cannot question the validity of the assignment. No one but plaintiff can complain of that.

II. Notice of the assignment needed not to be given to Martin to avoid the effect of a payment under Sec. 240 of the Practice Act.

In *Robinson v. Weeks* (6 How. Pr. 161), above cited, it was held that Sec. 240 was permissive merely; and the result of the cases shows that it is a permission of which a debtor to a judgment debtor can avail himself only at great risk of loss. In this case (*Robinson v. Weeks*) defendant had no notice of the assignment by plaintiff at the time he paid to Sheriff.

The assignment of a chose in action will transfer the interest to the assignee, notwithstanding a subsequent garnishment in favor of a creditor of the assignor; and notice of the assignment to the debtor is not necessary to protect the assignee. (*Morgan v. Low, Ebbets & Co.*, 5 Cal. 325; *Whitton v. Little*, Geo. Decis. Pt. 11, 99; *Littlefield v. Smith*, 5 Shep. 327; *Smith v. Sterritt*, 24 Miss. 3 Jones, 260; *Marmaduke v. McMasters*, Id. 51; *Pellman v. Hart*, 1 Penn. 263; 21 Ala. 166; 15 Miss. 409.)

III. The garnishment upon Martin did not constitute a lien upon the money due. The first garnishment was before judgment entered, and after assignment. The second garnishment was on the twenty-fifth, nine days after the assignment. If the title passed by the assignment, then there was nothing left to garnishee. If it did not pass by the assignment, then the garnishment was of no effect, because a judgment can be levied upon by execution and sold, and therefore the moneys due thereon cannot be garnisheed. (*Trowlidge v. Means*, 5 Pike, 135, 700; *Fore et al. v. Manlove et al.*, 18 Cal. 436.)

John R. Jarboe, for Respondent.

I. The first assignment being made before the case was tried, was the assignment of a cause of action arising out of a mere personal tort, which cannot be assigned. (*Comegys v. Vasse*, 1 Pet. 193.) A cause of action which affects the estate as trover for conversion of goods, survives the person and is assignable; but a mere personal tort as "malicious prosecution dies with the person and is

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not assignable." (Burrill on Assignments, 73, and cases cited in Note 2, 2d Ed.; *Hodgman v. Western R. R.*, 7 How. Pr. 492.)

II. A verdict in a case of this nature, does not change the nature of the demand. (*Crouch v. Gridley*, 6 Hill, 250; *Davenport v. Ludlow*, 4 How. 337; *Robinson v. Weeks*, 6 Id. 161.) Even the case of *ex parte Charles* (16 Vesey, 256) holds that in an action of tort there is no debt till after judgment. The costs were an incident merely of the judgment, and the very case cited by plaintiff is opposed to his position.

III. Even if there was a proper assignment to Williams and Parmelee, Martin paying over the money in good faith to the Sheriff would be protected, provided he paid before notice of his assignment. Equity protects only the interest of an equitable assignee against a payment to the assignor, or as in this instance to the Sheriff his representative, after he, the assignee, has notified the debtor of the assignment, for if the debtor pays to the assignor in good faith before being notified of the assignment, the assignee loses by his own laches. (Story's Eq. Juris. Secs. 1047, 1057; *Pope v. Huth*, 14 Cal. 403.)

NORTON, J. delivered the opinion of the Court—COPE, C. J. and CROCKER, J. concurring.

This action was brought to recover damages for a malicious prosecution. After the action was commenced, but before trial, the plaintiff assigned the cause of action to G. E. Parmelee. A verdict was obtained by the plaintiff, and then, before the judgment was entered, the plaintiff, as he states, with the consent of Parmelee, assigned one-half of the recovery to C. H. S. Williams. Some months afterwards, and after the judgment was entered on the verdict, the defendant paid the amount of the judgment to the Sheriff of San Francisco County in satisfaction of two executions held by him against Lawrence in favor of other parties. An execution having been subsequently issued on the judgment in this action, the defendant obtained an order setting it aside, from which order this appeal is taken.

The defendant claims that the payment to the Sheriff was a satisfaction of the judgment in this action, pursuant to the pro-

visions of Sec. 240 of the Civil Practice Act. The plaintiff, in behalf of Parmelee and Williams, claims that such payment was ineffectual to satisfy the judgment, because at the time of such payment the debt had been transferred. To this the defendant replies that the assignment, being before judgment, was not of a debt, but of a cause of action for a personal injury, which is not assignable; and also, that if assignable, the payment was made before notice of such assignment.

The plaintiff cites the case of *Robinson v. Weeks* (6 How. Pr. 161) as a decision that the want of notice of the assignment does not render such a payment effectual if an assignment had in fact been made, upon the ground that such a payment is voluntary and the party making it must take care, at his own risk, that he pays to or for the benefit of the party to whom he at the time owes the debt. It is not necessary for us to consider the soundness of the reasoning upon which this proposition is based, because the same case admits that a cause of action for a personal injury is not assignable. That action was for an injury to property, and the Court say in regard to assignments for torts: "The whole difficulty in regard to it, seems to have arisen from not distinguishing between such cases" (injury to property) "and mere personal torts, as assault and battery, slander and the like, which die with the person, and which all the authorities agree cannot be assigned." In that case the assignment was after verdict and before judgment, as in this case, and it is clear from the remarks just quoted, that the payment would have been held good, if the cause of action had been for a personal injury, as in this case, and for that reason not assignable. "In the latter case," say the Court, "there is nothing to assign but a mere injury, which does not survive the decease of the injured party, and in which no person can be regarded as having any property." This remark answers the plaintiff's suggestion, that he alone, and not the defendant, can object to the assignment. The objection to the assignment does not arise upon the form or sufficiency of the assignment, but upon the circumstance that the assignment is a nullity because there was no assignable subject upon which it could operate. (See also the cases of *Comegys v. Vasse*, 1 Pet. 198; and *Hodgman v. Western Railroad*, 7

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How. Pr. 492.) Although the case of *Countryman v. Boyer* (3 Id. 387) is in words an authority for the plaintiff, the decision upon this point is made without reference to other decisions and without noticing the distinction between wrongs to the person and wrongs to property. If, as one case suggests, the assignment might amount to a covenant by the assignor not to collect the judgment when recovered, still it was not an assignment of any thing, and the plaintiff remained the owner of the judgment and the defendant's debtor when the money was paid to the Sheriff.

The plaintiff in his brief assumes that the payments were made upon the executions under which Sheriff Doane had made a levy, and argues that his successor, Ellis, could not receive payment upon them. The defendant's affidavit, however, states the money to have been paid to the Sheriff on alias executions, and the receipt of Ellis is for money paid on the executions of which he had made levies.

The costs are only an incident of the verdict. They were not assigned in terms, nor was any judgment to be recovered assigned. If the verdict did not pass by the assignment, the costs did not pass.

The character of the claim was not changed, and it did not become a debt, which could be assigned in consequence of the verdict before a judgment was entered thereon. (*Crouch v. Gridly*, 6 Hill, 250; *Kellogg v. Schulyer*, 2 Denio, 73; *Ex parte Charles*, 14 East. 197.)

After judgment was entered upon the verdict, it became a debt which the defendant could pay to the Sheriff on executions against the plaintiff. (*Mallory v. Norton*, 21 Barb. 424.)

The order appealed from is therefore affirmed.

IN THE MATTER OF JOHN R. CORRYELL.

WHERE, upon application for discharge by *habeas corpus*, it appears that the prisoner, by virtue of a commitment in due form, is detained to answer an indictment pending in a Criminal Court, the Court or Judge hearing the application may proceed to inquire whether the indictment charges any offense known to the law; and upon determining that it does not, may discharge the prisoner.

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The statement in an indictment of some offense known to the law is essential to the jurisdiction of the Court, and is, therefore, under well settled rules, a fact which may be inquired into upon *habeas corpus*.

The engrossed copy of a legislative bill of any session prior to that of 1862 is not a public record within the meaning of Sec. 87 of the act concerning crimes and punishments.

APPLICATION for discharge by *habeas corpus*.

The petition alleges that the petitioner, John R. Corryell, is illegally detained in custody by the Sheriff of San Francisco County, and that the only authority for his detention is an order of commitment made by the Court of Sessions of that county, a copy of which is set forth in the petition. This order recites the finding of an indictment by the Grand Jury of said county against said Corryell, which is still pending and undetermined in said Court, and which it sets forth in full. The indictment accuses Corryell "of the crime of altering and falsifying a document and record belonging to a public office within said State, committed as follows: The said J. R. Corryell, on the ——— did falsely, deceitfully, and feloniously alter and falsify a certain document, to wit: a certain record of and belonging to the office of the Secretary of State of the said State, the same being an engrossed copy of a bill which was introduced into the Senate of the State of California," at the session of 1861, "and which said bill was engrossed by order of said Senate at said session, and which bill was entitled 'An Act to provide for the Sale of Marsh and Tide Lands of this State,' ——— the same being then, viz.: on the said tenth day of October, 1861, a public document of the Legislature of the State of California, and by law a record of and belonging to the office of said Secretary of State," and charges the altering to have been made by interpolating as an amendment the words: "either tide or marsh—excepting Alcalde grants, which are hereby ratified and confirmed."

The order then directs that said Corryell be committed to the custody of the Sheriff, and detained until he gives bail in the sum of \$6,000, or be otherwise legally discharged.

The petition further alleges that a demurrer to the indictment was interposed by petitioner in the Court of Sessions, and overruled, and that he then obtained a writ of *habeas corpus* from the Judge

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of the Twelfth District Court, who, after an examination, remanded him again to custody.

On this petition a writ of *habeas corpus* was granted by Chief Justice COPE, returnable before —, and subsequently the case was argued before COPE, C. J. and NORTON, J.

McAllister, for Petitioner.

Campbell, for the People.

COPE, C. J. delivered the opinion of the Court—NORTON, J. concurring specially.

A petition having been presented to us, stating that the petitioner, John R. Corryell, was unlawfully restrained of his liberty by the Sheriff of the County of San Francisco, a writ of *habeas corpus* was issued, to the end that the cause of his restraint might be inquired into, and its legality or illegality determined. In obedience to this writ, the petitioner has been brought before us, and the return of the Sheriff shows that he is in custody by virtue of an order of the Court of Sessions of San Francisco County, committing him for trial on an indictment found by the Grand Jury of the county, charging him with altering and falsifying a document and record belonging to a public office in this State. The indictment charges that the document altered was the engrossed copy of a bill introduced into the Senate of the State at its session of 1861, and that at the time of its alteration it was a public record belonging to the office of the Secretary of State.

The counsel for the petitioner contends that no offense punishable by law is charged in the indictment, and that consequently the order or commitment under which he is held is illegal and void. It is objected on the other side, that the present is not a proper proceeding for the determination of that question; that the commitment emanated from a Court of competent jurisdiction, and that its action in the premises is not subject to review on *habeas corpus*. Considerations of great importance are involved in this objection, and although we are compelled to overrule it as applied to a case of illegal imprisonment, we find it extremely difficult to lay down a rule under which abuses may not be practiced, and the business of

the Courts improperly interfered with. The vice of the objection is that it assumes that the Court had jurisdiction, whereas the fact of jurisdiction is the very fact which the petitioner disputes, alleging that the offense charged is one not known to the law. The Court derives its jurisdiction from the law, and its jurisdiction extends to such matters as the law declares to be criminal, and none other, and when it undertakes to imprison for an offense to which no criminality is attached, it acts beyond its jurisdiction. It has never been doubted that the fact of jurisdiction was a proper subject of inquiry in a proceeding of this character, and if such were not the case, the simple warrant of a Court, however arbitrary and illegal it might be, would constitute a complete answer to the writ. It is said that the Court before which a case is pending is the proper tribunal to decide the questions arising in it, and that no Judge or other Court can interfere by a collateral proceeding and impeach its action. This, as a general rule, is undoubtedly correct, but it is not correct in cases of imprisonment, where the remedy by *habeas corpus* is expressly provided to determine its legality, which, if it be a remedy at all, carries with it the power of relief. The remedy extends of course, only so far as to relieve the party from imprisonment, if he be illegally detained; but it certainly does extend that far, and it is the duty of the Court or Judge issuing the writ to investigate the cause of the detention and determine whether it is illegal or not. This duty is plainly enjoined by the statute, and in respect to an imprisonment under the order or commitment of a Court, the writ, although a collateral proceeding, performs to some extent the functions of a writ of review. The statute provides that "If it appear on the return of the writ of *habeas corpus* that the prisoner is in custody by virtue of process from any Court of this State, or Judge or officer thereof, such prisoner may be discharged in any one of the following cases," etc. Among the cases enumerated are these: "When the jurisdiction of such Court or officer has been exceeded;" and "When the process, though proper in form, has been issued in a case not allowed by law." It is impossible to give effect to these provisions except by the exercise of a revisory power over the tribunal imposing the imprisonment, and the authorities all agree that the jurisdiction

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conferred by the writ is appellate in its nature. "The decision that the individual shall be imprisoned," says Hurd, "must always precede the application for a writ of *habeas corpus*; and this writ must always be for the purpose of revising that decision." He characterizes the jurisdiction as appellate, and says: "The phrase appellate jurisdiction does not necessarily import a subordination of one Court or officer to another, although that is its more usual signification. It may signify the power to act judicially upon a question or right, notwithstanding a supposed conclusion against it, resulting from an alleged judgment; and this is its true signification as applied to the writ of *habeas corpus*. It is not, strictly speaking, a power of revision, which includes properly the power to affirm or reverse the judgment, and so establish or destroy it, but a power to arrest the execution of a void judgment or order. It acts directly on the effect of the judgment, to wit, the imprisonment; but only collaterally on the judgment itself." (Hurd on Habeas Corpus, 380.) As to the extent of the jurisdiction, the same author says: "The jurisdiction over the process being only collaterally appellate, the *habeas corpus*, as before intimated, cannot have the force and operation of a writ of error or a *certiorari*, nor is it designed as a substitute for either. It does not, like them, deal with errors or irregularities which render a proceeding voidable only, but with those radical defects which render it absolutely void." (Id. 382.) This is the settled rule in such cases; a proceeding defective for irregularity and one void for illegality may be reversed on appeal; but the latter defect only authorizes a discharge on *habeas corpus*. The process must be void and not merely voidable, and when the cause of commitment is shown, if it appear that the Court issuing the process is a Court of competent jurisdiction, and that its jurisdiction has not been illegally asserted, the writ has performed its office. If it appear, however, that the process was issued in a case not allowed by law, and in which, therefore, the Court had no jurisdiction to commit, the prisoner may claim his discharge as a matter of right. Such, according to the argument of the counsel for the petitioner, is the case now before us; and if this be so, the imprisonment is illegal, and the petitioner must be released.

The indictment must be incorporated in and constitutes a part of the order of commitment, and the questions presented are such as arise upon the face of the process. The proposition, broadly stated, is that the prisoner has been guilty of no crime; that the alteration of the document mentioned in the indictment was not an offense punishable by law. The Act concerning Crimes and Punishments (Sec. 87) provides, that any person who shall alter, deface, or falsify any minute, document, book, or any proceeding whatever, of or belonging to any public office in this State, shall upon conviction be punished, etc. The indictment, as we have already remarked, charges that the document in question, being the engrossed copy of a certain Senate bill, was a document belonging at the time of its alteration to the office of the Secretary of State. If this be true, there is no doubt that the indictment charges an offense within the meaning of the statute, and the matter resolves itself into a mere inquiry as to whether the document was or was not a document belonging to the office named. It was a part of the proceedings of the Senate at its session of 1861, and the question is whether there was any law transferring it to the custody of the Secretary of State, and requiring it to be kept in his office. An act passed on the fifteenth of May, 1854, provides that "the Secretary of State shall have the custody of, and shall carefully preserve, the enrolled copy of the Constitution of the State of California; the description of the State seal, and other seals of which a description may be required to be deposited in his office; the manuscripts containing the enrolled acts and joint resolutions and journals of the Legislature; and all the books, records, parchments, maps, registers, and papers that may be required to be deposited in his office." The only legislative documents referred to in this act are the manuscripts of enrolled acts, of joint resolutions and of the journals; and it is not pretended that its provisions can be so construed as to include engrossed bills. It applies, however, to all papers, records, etc., which may be required to be deposited in that office; and it is contended that by a subsequent act engrossed bills are required to be so deposited. The act alluded to was passed in 1861, on the last day of the session of that year, and provides that "the Secretary and Assist-

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ant Secretary of the Senate, and the Chief Clerk and Assistant Clerk of the Assembly, at the close of each session of the Legislature, shall mark, label, and arrange all bills and papers belonging to the archives of their respective houses, and deliver the same, together with all books of both houses, to the Secretary of State." It is entitled "An Act fixing the number of Officers and Employés of the Senate and Assembly, to define their Duties and establish their Pay;" and we are of opinion that its application was intended to be limited to future sessions. If such were not the intention with reference to the provision referred to, it is unfortunate that a contrary intention has not been expressed; but it certainly has not been, and we must take the act as we find it. It provides for the election of certain officers, and defines their duties, and it is upon these officers that the duties are imposed; and there is no provision referring to the officers of that session, nor did the act take effect until the expiration of sixty days after its termination. It is clear, therefore, that the act is limited in its operation to subsequent sessions; and the result is that there was no law requiring the document in question to be deposited in the office of the Secretary of State.

The only further question is, whether the prisoner should be held to answer the charge of altering the document as belonging to the office of the Secretary of the Senate. We are unable to find any law requiring documents of this description to be preserved in that office, and prior to the Act of 1861 no provision for keeping them after the close of the session seems to have existed. They appear to have been regarded as papers which had served their purpose, and become *functus officio*.

We are of opinion that the prisoner should be discharged, and it is so ordered.

NORTON, J.—I agree that the process by which the defendant is held does not show that he has committed any offense known to the law at the time of the commission of the offense as charged, and that he should be discharged from custody. I may hereafter write an opinion more fully expressing my views in this case.

REDDINGTON *et al.* v. WALDON *et al.*

THE right of a party to an action to testify therein on his own behalf depends entirely upon the statute.

Where an act amending the laws of practice is passed to take effect at some future time, judicial proceedings, intermediate between the passage and the time of taking effect, are governed by the old law.

The Act of 1861, amending Sec. 422 of the Practice Act so as to permit parties to testify on their own behalf, was approved May, 1861, but by a general law did not go into effect until sixty days after its passage. In an action tried on the thirteenth day of July, 1861, the defendants were admitted as witnesses on their own behalf, in accordance with the provisions of the amendment, to which plaintiffs excepted: *held*, that this was error, for which a judgment in favor of defendants must be reversed.

Where, on appeal from a judgment in favor of defendant, error is disclosed in the admissions on the trial of improper evidence in defendants' favor, the judgment will be reversed and a new trial ordered without considering whether or not the plaintiff proved a case entitling him to relief.

APPEAL from the Fifteenth Judicial District.

The facts are stated in the opinion.

H. K. Mitchell, for Appellants.

I. The Court erred in admitting the testimony of defendants, W. C. Waldon and Jesse Beene. (Stat. of 1861, 77, 521, 522.) The amendments to Sec. 422 of the Practice Act were not then in force.

II. The Court erred in holding that the debt due to defendant Beene from Waldon & Smith was a copartnership debt. (10 N. H. 77; Story on Part. Sec. 142; Collyer on Part. 2d Ed. 277; *Jacques v. Marquand*, 6 Cow. 497.)

H. O. Beatty, for Respondent.

I. The defendant Waldon was a competent witness without reference to the statute. He was not actually interested in the controversy, and by the general rule in equity was competent for his co-defendant.

II. Supposing that the admission of defendants as witnesses was erroneous, still the judgment should not therefore be reversed.

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The plaintiffs proved no case entitling them to relief, and the motion for nonsuit should have been granted. That motion having been improperly overruled, error in subsequently admitting improper evidence for defendants was immaterial.

CROCKER, J. delivered the opinion of the Court—COPE, C. J. and NORTON, J. concurring.

This action was brought by plaintiffs to have certain moneys collected by the Sheriff of Butte County, Middleton, one of the defendants, applied on the debt of the plaintiffs. The moneys were received by the Sheriff as the proceeds of the sale of certain property on an execution issued on a judgment in favor of one Beene against Waldon & Smith, all of whom were defendants. It appears that Beene levied his attachment on the property of Waldon & Smith on the sixth day of May, 1860, and the plaintiffs levied their attachments upon the same property on the fourteenth day of May, 1860; but the plaintiffs claim that Waldon & Smith were partners; that the property sold was partnership property; that their debt is a partnership liability, that Beene's is not, and that, therefore, they are entitled to the proceeds of the sale of the property. They also aver that Smith became a guarantor on the note made by Waldon to Beene, on which Beene obtained his judgment, for the purpose of defrauding plaintiffs; but this is denied, and no proof seems to have been offered to sustain it. The Court found that Beene's debt was a partnership liability, and therefore dismissed the action, and rendered judgment against the plaintiffs for costs, from which this appeal is taken.

On the trial Beene and Waldon were admitted as witnesses on their own behalf, against the objection of the plaintiffs, who excepted thereto, and they assign this as their first ground of error. The finding of the Court, that Beene's debt was a partnership liability of Waldon & Smith, seems to have been founded mainly, if not entirely, on the evidence of these two parties. The right of a party to an action to testify therein on his own behalf, depends entirely upon the statute, and is regulated by the provisions of Secs. 421, 422, and 423, of the Practice Act. This suit was tried on the thirteenth day of July, 1861. The Act of 1861, amendatory of

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Sec. 422, by which amendment parties are allowed to testify on their own behalf, upon certain conditions, was approved May 18th, 1861, but did not take effect until sixty days thereafter, as provided by another act, passed March 28th, 1861. (Stat. of 1861, 77.) That amendment was not, therefore, in force at the time of the trial in this case. The defendants in this instance who testified on their own behalf do not seem to have been brought within the provisions of the law then in force, and the Court below therefore erred in admitting them to testify.

But it is urged by the respondent, that the plaintiffs failed to prove any case in the Court below entitling them to any relief, and therefore, the final judgment of dismissal is correct. We are not sure as this case comes within the principles of the case of *Conroy v. Woods* (13 Cal. 631), still there is some ground for saying that this action is sustained by the rules there announced. But that question it is unnecessary for us to decide at present, as the defendants on a new trial may be enabled to sustain this finding upon the question of the character of Beene's debt, and the liability of the parties thereon, by competent testimony.

The judgment is reversed, and the cause remanded for further proceedings.

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DEFENDANT upon the purchase of certain land from B, agreed with him in writing, as part of the consideration, to pay to plaintiff a debt then due the latter from B. Plaintiff afterwards assented to the arrangement, and verbally agreed with defendant to look to him for his debt and release B: *held*, that this agreement was not within the statute of frauds, and gave plaintiff a right of action against defendant for the debt.

Whether the assent of plaintiff was necessary in order to enable him to maintain the action, see in connection with former decisions in this case 18 Cal. 80; *Lewis v. Covillaud* (21 Id. 178).

When A by agreement between him and B, assented to by C, becomes liable to pay to the latter a debt originally due to him from B, the assignee of C may maintain an action for the debt, in his own name, against A.

Where the proof was that defendant, having agreed with B, whom he owed, to pay in lieu thereof to the plaintiff, a creditor of B, the amount of his (plaintiff's) demand, afterwards met the plaintiff and stated to him that he

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(defendant) had agreed with B to pay his (plaintiff's) claim, and was to pay it, and that plaintiff then stated his "willingness to look to defendant": *held*, that this proof authorized a finding that defendant agreed with plaintiff to pay him his demand.

APPEAL from the Tenth Judicial District.

The facts are stated in the opinion.

G. N. Sweezy, for Appellant.

I. The contract between Hutchinson and Beach is a sealed instrument, a deed *inter partes*, and no authority, American or otherwise, tolerates a recovery in such cases by the person for whose benefit the promise is made. Parsons in his works and the notes thereto, lays down the rule that no recovery can be had in such cases. (1 Par. on Cont. 389-391, and notes thereto.)

II. There was no evidence showing any binding or valid agreement or contract between Hutchinson and the plaintiff, and the others whose claims were transferred to the plaintiff, that can be enforced against the defendant. That would be an agreement to answer for the debt of another without any consideration expressed in writing or otherwise passing from plaintiff to defendant.

III. Can the plaintiff maintain an action in his own name for the claims that the claimants transferred to him after the promise or obligation of Hutchinson, as they say, to pay? That is going beyond the American cases. They hold that the third person can sue upon such promise. This would be holding that the transferee of such third person could sue.

Rowe & DeLong, for Respondent.

Where one in consideration of something received by him promises to pay the debt of another, and makes the promise either to the party from whom he receives the consideration or to the party to whom the payment is to be made, it is binding and is not within the Statute of Frauds. (*Farley v. Cleveland*, 4 Cow. 432.)

And it makes no difference though the original debt still exists and remains entirely unaffected by the new agreement. (Same case, 432.)

This case comes within the rule laid down by this Court (in cases

of promises to pay the debt of another) in the case of *Wiggins v. McDonald* (18 Cal. 126); see also *Owings v. Owings*. (1 H. & Gill. 484); Chitty on Cont. 628, in note.

CROCKER, J. delivered the opinion of the Court—COPE, C. J. and NORTON, J. concurring.

George H. Beach was indebted to the plaintiff and several other persons for work and labor done on the "New England Farm." Beach sold the farm and other property thereon to the defendant, and as a part of the price the defendant agreed in writing with Beach to pay the plaintiff and the other laborers the debts due to them. Immediately after, the plaintiff and the other laborers agreed with defendant to release Beach from the debts, and to look to him alone for their payment. The other laborers assigned their claims to the plaintiff, and he brought this action to enforce the contract. The case was tried by the Court, who found in favor of the plaintiff, and judgment was rendered accordingly, from which, and an order refusing a new trial, the defendant appeals.

This action has been already before this Court upon the pleadings, and will be found reported in 18 Cal. 80. Upon the return of the case to the Court below the pleadings were amended, and the point upon which the former decision was founded is not now in the case.

It is now objected that the Court erred in finding that the plaintiff and his assignors "agreed" with the defendant to look to him for the payment of their debts, and the counsel for the appellant sets forth what he understands to be facts from the evidence on this point; that is, that the defendant, in the absence of Beach, stated to the plaintiff and his assignors that "he had purchased Beach's property, and had agreed with Beach to pay their claims, and stated to them that he was to pay them, and that such claimants then stated to defendant their willingness to look to him." The facts, as thus stated by the counsel, amount substantially to an agreement between these parties and the defendant, as found by the Court. But even if they differed materially, it is the finding of the Court that is to govern, unless clearly unsupported by evidence which is not claimed in this case.

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The next question raised by the appellant is, that the defendant is not liable to the plaintiff; that his only liability is to Beach, upon his written contract; and that the agreement with the plaintiff and his assignors, not being in writing, is void under the Statute of Frauds. The defendant being indebted to Beach for the purchase money of certain property, and Beach being indebted to the plaintiff and his assignors, the two mutually agree that the defendant shall pay these debts of Beach, and this is assented to by these creditors of Beach. Here is a mutual agreement by the parties interested, and it can make no difference that this mutual agreement was not perfected at the same moment of time, or that all were not present at the time of its completion. Beach and the defendant assented to it, when the agreement was signed and delivered, and the creditors afterwards assented, when informed of the agreement by the defendant. Their assent to the agreement gave them a right of action against the defendant, and the case is not within the Statute of Frauds. (*Farley v. Cleavland*, 4 Cow. 432; *Tatlock v. Harris*, 3 Term, 174; *Wilson v. Coupland*, 5 Barn. & Ald. 228; *Heaton v. Angier*, 7 N. H. 397; *Gold v. Phillips*, 10 Johns. 142; *Olmsted v. Grunly*, 18 Id. 12.)

One branch of the rule upon this subject is very clearly laid down in *Farley v. Cleavland* (4 Cow. 432), in these words: "In all these cases, founded upon a new and original consideration of benefit to the defendant, or harm to the plaintiff, moving to the party making the promise, either from the plaintiff or the original debtor, the subsisting liability of the debtor is no objection to the recovery."

It is also insisted that the plaintiff cannot recover upon the claims assigned to him by the other parties. This is not a valid objection. Our Practice Act clearly authorizes the assignment of things in action, such as accounts and unliquidated demands arising out of contract, and the mere fact that the liability on the original contract has been transferred from Beach to the defendant can make no difference in the right to assign, or the right of the assignee to maintain the action in his own name.

The judgment is affirmed.

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HILL v. TAYLOR.

THE purchaser at judicial sale of a mining claim may, where the judgment debtor remains in possession, working the claims, and is insolvent, have a receiver appointed to take charge of the proceeds during the period allowed by statute for redemption.

The complaint stated that at a foreclosure sale plaintiff purchased an undivided one-third interest in a tract of mining ground; that the mortgagor was in possession and insolvent, and in connection with the owners of the other interests was working the claim and taking the proceeds; that before the expiration of the period of redemption the claim would be worked out and its value destroyed, and prayed judgment for the amount already received by the debtor since the sale, and that during the period of redemption a receiver be appointed to take charge of the proceeds: *held*, that on the facts stated plaintiff was entitled to the relief sought, and that an order sustaining a general demurrer to the complaint was erroneous.

The working of mines is something more than the ordinary use of real estate by one in possession, and requires the use of more than ordinary remedies to protect the rights of the purchaser at a judicial sale. It may probably be restrained as waste, under Sec. 235 of the Practice Act, but the appointment of a receiver is the more appropriate remedy, as it permits the continued working of the claims.

APPEAL from the Seventeenth Judicial District.

The facts are stated in the opinion.

Vanclief & Bowers, for Appellant.

As to the right of the plaintiff to receive the rents and profits, or the value of the use and occupation of the premises during the time allowed for redemption, there can be no question.

As to the remedy, it has been settled that where the mortgagor or judgment debtor is in possession, he receives and holds the profits as trustee for the purchaser, and that whenever the trust fund is in danger of loss a Court of Equity will take possession of it by means of a receiver. (*Harris v. Reynolds*, 13 Cal. 518; *Reynolds v. Harris*, 14 Id. 676.)

Creed Haymond, for Respondent.

The case presents the question: Whether in every case of the sale of mining claims under judicial decree the purchaser is en-

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titled to a receiver of the value of the use and occupation thereof during the time allowed by law for redemption. In *Grey v. Ide* (6 Cal. 99), which was an application for the appointment of a receiver in a foreclosure case, *pendente lite*, the Court say: "The estate remains that of the mortgagor in the character of an owner, and must continue so with all the incidents of ownership, until by a foreclosure and sale a new owner is substituted." No new owner is substituted until the sale under decree is consummated by conveyance (Sheriff's Deed). (*McMillan v. Richards*, 9 Cal. 365; *Knight v. Fair*, 9 Id. 117; *Goodenow v. Ewer*, 16 Id. 462.) Consequently, the reasoning of the Court in *Guy v. Ide* applies with equal force to this case.

In *Harris v. Reynolds* (13 Cal. 518), cited by appellants, there were many equitable circumstances not existing in this case; the last five lines of the decision in *Harris v. Reynolds*, the only portion of the decision that in the least supports appellant's position, is mere *dicta*, utterly at variance with the principles laid down in the cases cited by respondent.

CROCKER, J. delivered the opinion of the Court—CORK, C. J. concurring.

The complainant in this action avers that the defendants are a mining company; that Taylor, one of the defendants, was the owner of one-third of the mining claims of the company and mortgaged the same to one Conley, who assigned the mortgage to the plaintiff; that he foreclosed the mortgage, and on the twelfth day of April, 1862, purchased the interest mortgaged at the sale under the decree of foreclosure; that a certificate of sale duly issued to him; that the defendants are working the claims and taking out gold therefrom; that the dividends upon said one-third interest have been from seventy-five to one hundred dollars per month, and will amount to about that sum in future; that Taylor is still in possession of said one-third part, and receiving the dividends; that he has demanded of Taylor and the defendants the proceeds of said third part, over and above the expenses of working, and the value of the use and occupancy thereof, which they have refused to pay to him; that the claims will be worked out and exhausted before the six

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months allowed by law for redemption will have expired, and will then be of no value, and that Taylor is insolvent and has no property subject to execution. The complaint prays that the defendants be required to pay him the proceeds of the one-third interest over and above the expenses of working the same, and that a receiver be appointed to receive the proceeds during the pendency of the suit. To this complaint the defendants demurred—first, because the complaint did not state facts sufficient to constitute a cause of action; second, because of a misjoinder of parties in joining the other members of the company as defendants with Taylor. The Court sustained the demurrer, and entered judgment for the defendants, dismissing the complaint, from which the plaintiff appeals to this Court.

The only question submitted is, whether the complaint states sufficient facts to entitle the plaintiff to the relief prayed for. We think it does, and the Court below, therefore, erred in dismissing it. Sec. 143 of the Practice Act provides that “a receiver may be appointed by the Court in which the action is pending, or by a Judge thereof. First, before judgment, provisionally, on the application of either party, when he establishes a *prima facie* right to the property, or to an interest in the property which is the subject of the action, and which is in possession of an adverse party, and the property or its rents and profits are in danger of being lost or materially injured or impaired.” The case made by the complaint is clearly within this provision of the Practice Act. It avers that the claim will be worked out and exhausted before the six months allowed for redemption will have expired, and that it will then be of no value, and that Taylor is insolvent. The demurrer admits these facts to be true; and if true, it shows that the property purchased by plaintiff at the sale, as well as its rents and profits, are in danger of being entirely lost to him unless a receiver be appointed. The plaintiff is entitled, under the law, to the property purchased by him at the foreclosure sale, and to its rents and profits, or the value of the use and occupation thereof from the time of the sale up to the date of any redemption made. In this case, Taylor, the judgment defendant and mortgagor, is receiving all the profits from the property, and as he is insolvent, they will

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be entirely lost to the plaintiff unless a receiver is appointed. The working of the mines, and the extraction of the gold therefrom, is something more than the common, ordinary use of real estate by one in possession, and requires the use of more than the ordinary remedies to protect the rights of the purchaser. It constitutes a waste or destruction of the very property itself, or all that is of any essential value; and as such might perhaps be restrained, under the provisions of Sec. 235 of the Practice Act. But it is for the interest of all parties that a receiver be appointed rather than stop the working of the claims entirely. The averments in this complaint bring the case within the principles laid down by this Court in the case of *Harris v. Reynolds* (13 Cal. 514).

Judgment reversed and cause remanded.

BURPEE v. BUNN *et al.*

- A DEED of trust made by a debtor in favor of his wife at a time when he is insolvent and his property under attachment, is fraudulent and void as to creditors. Partnership debts must be first paid from the partnership property before any portion of it can be applied to the payment of the individual debt of a copartner. Where one of several partners sells his undivided interest in the partnership property, the purchase money stands in the place of the property, and is liable for the partnership debts, the same as the property for which it was paid.
- A separate creditor of one of several partners levied an attachment for his debt upon the partnership property, and afterwards made an agreement with a trustee, to whom his debtor had conveyed the property, by which the latter stipulated to pay the attachment debt from the proceeds of a sale of the property, after paying expenses and prior claims: *held*, that neither by his attachment, nor by the agreement, did the separate creditor acquire any title to, or lien upon, the property, as against the superior equity of a subsequently attaching creditor of the partnership.

APPEAL from the Eleventh Judicial District.

The facts are stated in the opinion.

Higgins & Higgins, for Appellant McWilliams.

I. Burpee can make no valid claim to the fund. It is a specific, definite fund, acquired by the sale of property long after the date

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of his agreement with Bunn, and not belonging to Bunn. Even if he had a valid claim or cause of action against Bunn on his contract, that fact would give him no right to this fund which belongs to other parties. His whole claim is that Bunn, as trustee, agreed to give him the first money that came to his hands to apply on his debt. At the time of the agreement, the fund was not even in existence, and there could be no specific lien upon it. It is but an executory contract, at best, and for any breach of its conditions he must look to the contracting party in a personal action.

Bunn had no right or authority to make such a contract for Mrs. Crandall, and having made it, it cannot bind her, or her husband, or the property of either of them. As a trustee, acting under certain defined powers, and for certain definite purposes, he cannot go beyond the limits of the authority expressly delegated.

II. Mrs. Crandall's claim is founded entirely upon the deed of trust from her husband, made for the very purpose of defrauding his creditors in the collection of their just debts. Unless the Court holds that a party in embarrassed and insolvent circumstances can, by a deed of trust for the benefit of his wife, so deed away his property as to keep it beyond the reach of the law for the protection of others, and at the same time keep everything within his own family, she has no claim.

If this fund is not the separate property of Mrs. Crandall, as recognized by our statutes, then it is most certainly liable for his debts, and is bound to answer our suit and garnishment. That it is not her separate property, see Secs. 1, 2, Arts. 2605, 2606, p. 487 Wood's Digest; Secs. 6, 9, p. 488; 4 Cal. 200; 7 Id. 27; and particularly 12 Id. 253.

III. McWilliam's attachment was levied for a partnership debt upon the fund which was partnership property. His equity is, therefore, superior to that of the individual creditor, notwithstanding the prior attachment of the latter. (*Chase v. Steel*, 9 Cal. 64; *Conroy v. Woods*, 13 Id. 626.)

Hereford & Williams, for Appellant Burpee.

James Anderson, for Respondent.

I. Burpee, according to his own allegations, has sufficient prop-

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erty liable to his judgment secured by virtue of his proceedings to satisfy his demands against said H. Crandall, aside from the fund in Court, and is therefore not entitled to it. He bases his right to it upon the written agreement entered into between him and Bunn, on the twelfth of August, 1861. That agreement is without any consideration moving from Burpee to Bunn, and is therefore void. The language of the agreement is, "Now, in consideration of said Dwight Burpee having stipulated to delay execution on said judgment against said Crandall, I promise and agree, as trustee aforesaid," etc., etc. Burpee had previously made the agreement with H. Crandall, the consideration of which was that the said Burpee should take judgment by default, and Burpee was not to issue execution for six months, which term had not expired when he brought suit. Bunn was not authorized to pay the moneys on his demand; it would have destroyed the trust.

II. McWilliams & Co. could in no event have any right to exceeding fifty dollars of the fund, because less than fifty dollars of the indebtedness they sue for had accrued when H. Crandall left the firm of Foskett, Craig & Crandall. They had no claim to even this amount of the fund, because it is no part of the partnership property, and no part of the personal property of H. Crandall, nor the result of any collections or sales of property of any kind, due to or belonging to either the firm or any one member of it. All the firm property, rights, and interests, and all the individual property, rights, and interests that H. Crandall had at the period he was responsible to them, and at the time of their levying attachment, yet remains, as a fund out of which McWilliams & Co. have a right to make their demand.

III. Abigail Crandall, as a deserted wife, in a necessitous condition, was and is entitled to the fund. (*Laurence v. Spear*, 17 Cal. 421.) The possession of her agent, Bunn, is her possession, and the possession of money or chattels personal is *prima facie* evidence of ownership. Burpee and McWilliams & Co. have not overcome her *prima facie* right to the fund, and there can be no other adjudication than to sustain the judgment below.

CROCKER, J. delivered the opinion of the Court—COPE, C. J. and NORTON, J. concurring.

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Foskett, Craig & Crandall were carrying on business as partners in Placer County, when Burpee, a creditor, having an individual debt against Crandall, commenced an action thereon and attached the partnership property. After the attachment, and before judgment, Crandall conveyed the property to Bunn, as trustee for his wife, and Burpee and Bunn enter into an agreement by which Bunn agrees, in consideration of a stay of execution, to pay the judgment out of the first moneys coming into his hands as trustee not covered by "expenses and prior claims." Burpee recovered judgment for eight hundred and thirty-seven dollars and sixty-five cents against Crandall. Foskett and Craig afterwards purchased the property of Bunn, and paid him \$1,000 therefor. McWilliams, a creditor of the partnership firm of Foskett, Craig & Crandall, then sued the members of that firm, and attached these funds in the hands of the trustee, by serving a copy of the attachment, with notice of garnishment. Burpee then commenced this action against Bunn on the agreement. Bunn set up the foregoing facts, and paid the money into Court, after deducting two hundred and forty-nine dollars and seventy-five cents as his expenses. McWilliams and Mrs. Crandall were made defendants by order of Court, and they appeared and answered, each claiming the money paid into Court. McWilliams recovered judgment for \$1,082 83 in his attachment suit. The cause was tried by the Court, and a judgment rendered that the seven hundred and fifty dollars and twenty-five cents paid into Court by the trustee be paid to Mrs. Crandall, and that she recover her costs against McWilliams and the other parties. McWilliams moved for a new trial, which was overruled, and Burpee and McWilliams appeal from the judgment and the order overruling the motion for a new trial to this Court.

In this case there are three parties who claim the fund paid into Court, and the question to be determined is, which one of the three is entitled to it? First—Burpee claims it under the agreement made between him and Bunn, the trustee. Second—McWilliams claims it because the fund is the proceeds of the sale of partnership property, and his debt being a partnership debt, he has a prior right thereto. Third—Mrs. Crandall claims it as her property under the trust deed.

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First, as to the claim of Mrs. Crandall. It is clear that she is not entitled to the property described in the trust deed, or its proceeds, as against the claims of either Burpee or McWilliams, the former being a creditor of Crandall individually, and the other a creditor of the partnership firm of Foskett, Craig & Crandall. Sec. 20 of the Act concerning Fraudulent Conveyances (Wood's Digest, 107) provides, that "every conveyance or assignment, in writing or otherwise, of any estate or interest in lands, or in goods in action, or of any rents or profits issuing therefrom, and every charge upon lands, goods or things in action, or upon the rents and profits thereof, made with the intent to hinder, delay, or defraud creditors or other persons, of their lawful suits, damages, forfeitures, debts, or demands, and every bond or other evidence of debt given, suits commenced, decree or judgment suffered, with the like intent, as against the persons hindered, delayed, or defrauded, shall be void." The deed of trust in this case, made for the use and benefit of the wife of the debtor, at a time when he was insolvent and his property under attachment, is clearly in violation of this statute, and fraudulent and void as to his creditors. (1 Story's Equity, Secs. 355, 357, 359.) The Court therefore erred in decreeing the fund to Mrs. Crandall.

The next question is, which of the two claimants, Burpee or McWilliams, has the better right to the fund. The former claims it under his agreement with Bunn, but it is very doubtful whether he has any right, under that agreement, to follow and reach the particular fund, or has any lien upon the money arising from the proceeds of the property named in the trust deed, and is not confined to his personal action against Bunn for breach of agreement. But we do not deem it necessary to determine this point, for the agreement itself subjects Burpee's claim upon the proceeds of the trust property to expenses and "prior claims;" and if McWilliams has a better right to these proceeds, it may well be questioned whether Burpee has any right thereto until the claim of McWilliams is satisfied. At all events, Burpee cannot set up the agreement between himself and Bunn as a defense to any claim of McWilliams, who was not a party and seems never to have consented thereto. The question then narrows itself down to this: Has McWilliams a

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better legal or equitable right to the proceeds of the sale of this partnership property, he holding a partnership debt, than Burpee, who holds but a separate, individual debt against Crandall? We think he has, and that the District Court erred in not rendering judgment in his favor. In *Chase v. Steel* (9 Cal. 64) it was held, that partnership debts must be first paid from the partnership property before any portion of it can be applied to the payment of the individual debts of the partnership. In *Conroy v. Woods* (18 Cal. 626) the same principle was decided, and it fully determines the question now before us. In that case the Court say that the mere fact of the separate creditor's "getting his separate judgment, issuing execution and making a levy, gave him no title to this (partnership) property, as against the superior equity of these firm creditors." So in this case, the mere fact that Burpee, a separate creditor of one of the partners, had levied his attachment on the partnership property, and had made an agreement with the trustee to receive the proceeds of its sale, gave him no title to the partnership property or the proceeds of its sale as against the superior equity of McWilliams, a creditor of the partnership. These principles have also been reaffirmed in *Dupuy v. Leavenworth* (17 Cal. 262).

Judgment reversed and cause remanded, with directions to enter a judgment in accordance with this opinion.

On petition for a rehearing, CROCKER, J. delivered the following opinion—the other Justices concurring:

In the petition for a rehearing filed in this case, it is urged that the conveyance from Crandall to Bunn, as trustee for his wife, was only of the interest of Crandall as a member of the firm of Crandall, Foscett & Craig, and that it only operated as a transfer of the interest he might have left after the payment of the debts of the firm, and a full settlement between the partners. We view it as a conveyance of his undivided share of the partnership property, and that, as to partnership creditors, it still continued partnership property in the hands of Bunn, liable to the partnership debts. It could not be changed from partnership to individual property, so as to affect the rights of partnership creditors in any such way. The

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purchase money paid to Bunn for this partnership property, whether paid with partnership means or not, stands in the place of the property as the proceeds thereof, and as a fund derived therefrom, and liable to the partnership debts the same as the property for which it was paid.

The rehearing is therefore denied.

SAMPSON *et al.* v. OHLEYER.

WHERE, pending an action of ejectment against a tenant, the latter transferred the possession to his landlord who had actual notice of and defended the suit, but was not made a party, and plaintiff recovered judgment: *held*, that under the writ of restitution authorized by the judgment, the landlord might be dispossessed.

In ejectment against the occupant of the premises, a judgment of recovery binds not only the defendant but all persons who receive possession of the premises from him with actual notice of the pending suit.

Persons not parties to a suit in ejectment and in possession before and at the time it is brought, or those claiming under them, cannot be ousted by the writ of restitution issued upon a judgment therein in favor of the plaintiff.

A person in possession of land where a writ of restitution is served, is presumed to hold under the defendant in the action, and to avoid being dispossessed by the writ, must show affirmatively that he holds by a right independent and paramount.

If a judgment is recovered against a party by the fault of an attorney employed by him therein, the party has his remedy against the attorney, but the judgment cannot be disturbed on that account, unless fraud, or collusion, or insolvency of the attorney is shown.

In the absence of any statutory regulation a purchase made of property actually in litigation, *pendente lite*, for a valuable consideration, and without any express or implied notice, in point of fact affects the purchaser in the same manner as if he had such notice, and he will accordingly be bound by the judgment.

The effect of our statute (Practice Act, Sec. 27), providing for the filing of a *lis pendens*, is to abrogate the rule making the mere pendency of an action *constructive* notice. It does not change the rules of law relating to *actual* notice of a pending action, and the effect of such actual notice upon parties dealing with or taking possession of property in litigation.

Where after the commencement of an action of ejectment against a tenant he gave notice thereof to his landlord, and requested him to defend, and the latter employed an attorney to conduct the suit: *held*, that the actual notice given

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to the landlord was, as to him, equivalent to the filing of a *lis pendens*, and in an equal degree made the subsequent judgment obligatory upon him.

APPEAL from the Tenth Judicial District.

The facts are stated in the opinion.

George Rowe, for Appellants.

A defendant in ejectment cannot, in general, transfer his possession so as to defeat the execution in the ejectment suit. (*Hills v. Tuttle*, 9 Cow. 233; Tillanghast Adams, 339 note.) Therefore, as Ohleyer was in possession of the land in dispute when the action was commenced, and transferred it, or allowed Green to retake possession, *pendente lite*, Green was in no better situation than Ohleyer, and is bound by the judgment.

A purchaser of lands, *lis pendens*, is subject to eviction by *habere facias* without being made a party. (*Long v. Morton et al.*, 2 A. K. Marshall, 40.)

And if a purchaser is liable to be evicted, how much more a landlord who employs counsel to defend his tenant, and then retakes the possession which he had given to his tenant, having had full knowledge of all the circumstances. An ejectment is brought by H against B, pending which C and D take possession of the land in dispute. A recovered a verdict and judgment: *held*, that the Sheriff, by virtue of the writ of possession, must dispossess C and D, and deliver the possession to A. (*Hickman's Lessee v. Dale*, 7 Yerg. 149.)

A party who has defended his claim in a former trial (in a case where he had agreed to indemnify another), in the name of that other, and who had a full opportunity to be heard in such former trial, will not be allowed to litigate the same subject matter in another proceeding commenced by himself. And as the claim of Green to the land in dispute has already been decided in the case of *Sampson et al. v. Ohleyer*, the judgment in that case ought not to be set aside to allow Green to come in to defend when he has already been in Court, and has been heard in the case. (*Dutil v. Pacheco*, 21 Cal. 438.) If Green wishes to litigate his right to the land, he can commence a new suit of ejectment against the

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party in possession. He ought not to be heard twice in the same suit.

It has not been positively decided in this State, that actual notice of the pendency of an action is equal to *lis pendens* filed. (*Richardson v. White*, 18 Cal. 102.) But on principle, there can be no doubt of it, for the only object of a *lis pendens* is to give notice to parties interested, which it does not always do, while actual notice produces all the results that the *lis pendens* does in those fortunate cases where the *lis pendens* brings the actual notice home to the party.

On principle, then, and on the authority of the practice in chancery, I say that Green was bound by the judgment against Ohleyer.

The suit in the case of *Sampson v. Ohleyer*, is a suit in which Green could have intervened. (See Prac. Act, 537, Sec. 71; also the doctrine in relation to the time when intervention may be made, cited in note 12, pp. 538, 539 Id.; *Hocker v. Kelly*, 14 Cal. 164; also opinion of this Court in the case of *Green v. Covillaud*, 10 Id. 324.)

G. E. DeLong, for Respondent.

Respondent, I. Green, is in no manner bound by the judgment rendered in the case of *Sampson v. Ohleyer*, for these reasons: 1st, he was not joined as a party to the action, and the record shows that he was a stranger thereto; 2d, for the reason that he was not given even constructive notice of the pendency of that action—they, Sampson and others, when they commenced that suit having filed no *lis pendens*; 3d, that no claim of Green's to said land or his right of possession thereto was pleaded therein, or therein tried or determined. Consequently, that he was wrongfully and unlawfully dispossessed therefrom under said writ, which even by its own terms ran or was directed only against Ohleyer or those holding under or through him.

This Court, in the case of *Peabody v. Phelps* (9 Cal. 213), laid down the following doctrine, viz.: "A party is not bound by a judgment rendered in an action of ejectment when he has not received legal notice of the action. Such judgment is not evidence against him of paramount title in the plaintiff in ejectment. Mere cogni-

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zance of the existence of the action is not legal notice. To be available the notice must apprise the party whose rights are to be affected of what is required of him, and the consequences which are to follow if he neglects to defend the action."

In the case of *Gilbert v. The Columbia Turnpike Co.* (3 Johns. Cases, 107) the Court say: "A notice in legal proceedings means a written notice." (See also *Ainslee v. The Mayor of New York*, 1 Barb. 168; *Jackson v. Stiles*, 1 Caine, 504; *Ex parte P. Reynolds*, Id. 499; 4 Hill, 467.)

Our State Constitution (Art. 8) provides "that no person shall be deprived of life, liberty, or property, without due process of law." This doubtless means process against the person. No process of any nature in this case issued against Green, yet he is deprived of his property.

In the case of *Rogers et al. v. Rippey* (25 Wend. 431) the Court say: "that a judgment in ejectment against tenants is not conclusive upon the landlord, although the latter retained an attorney to defend the suit brought against the tenant, especially as on the trial as between the plaintiff in the suit and the landlord the title of the latter did not come in question."

In the case of *Jackson v. Stiles* (above cited) the Court in its opinion says: "As therefore there was a full knowledge in October last of an intention to make this application, and the transactions are all of a recent date, we are of the opinion that a default entered against the casual ejector, the judgment thereon, and the writ of possession, be set aside and a writ of restitution issue on payment of costs." (See also *Jackson ex dem. Mentz & Mentz v. Stiles*, 4 Johns. 489; 6 B. Mon. 62; *Doe ex dem. The Grocers' Co. v. Roe*, 5 Taunton, 205; *Camden et al. v. Haskell*, 3 Rand. 465; see also *Jackson ex dem. Edm. et al. v. Rathburn*, 3 Cow. 291; *Jackson ex dem. Southerland et al. v. Stiles*, 5 Id. 418.)

CROCKER, J. delivered the opinion of the Court—COPE, C. J. and NORTON, J. concurring.

The plaintiffs commenced this action on the third day of January, 1861, to recover possession of a tract of land held by the defendant as a tenant of Isaac Green. When the process in the action

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was served on Ohleyer, he notified Green of the fact of his being sued, and asked him what was to be done, as he was not going to defend the suit at his own expense. Green replied that he would stand behind him in the action and would pay all damages, and would save him harmless from all costs and expenses. The defendant took no further steps and never employed any counsel in the case, but Green employed an attorney who put in an answer for him. The defendant delivered up the possession of the property to Green about the first day of February, 1862, while the suit was pending, and before the judgment was rendered. The attorney testifies that he was employed by Green to defend the action. On the fourteenth day of May, 1862, a judgment was rendered in favor of the plaintiffs, by consent of both parties through their attorneys, for the "restitution of the said premises, as well against the said George Ohleyer, the defendant, as against all other persons who may be in occupation of the whole or any part of the said premises under or through the defendant, George Ohleyer," and a writ of restitution was ordered to issue to that effect. The writ was issued upon the judgment, and the return shows that the Sheriff by virtue thereof placed the plaintiffs in full possession of the premises. Green then filed his petition alleging that he had the right of possession; that the Sheriff had turned him out and put the plaintiffs in without any right; that he had no legal notice of the action against Ohleyer and was not made a party thereto, and praying that the action might be opened and the judgment so modified as not to affect his rights; that he be made a party to the action and allowed to defend, and that a writ be issued to restore him to the immediate possession. The plaintiffs answered the petition by setting up that the rights of Green had been fully adjudicated in the case of *Green v. Covillaud et al.*, which was formerly before this Court, and is reported in 10 Cal. 317. They also set up the fact that Green had actual notice of the suit, and employed the counsel who consented to the judgment. The matters set up in the petition were afterwards tried by the Court, who found that Green did not receive any legal notice of the action against Ohleyer at any time during the pendency of said action, and therefore his claim of ownership and possession was not determined therein;

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that his eviction by the Sheriff was unauthorized; and it was ordered that the judgment be vacated, that Green be made a party to said action, that the writ of restitution be quashed, and that a writ issue to remove all persons found in possession of the premises, and restore the same to Green. The plaintiffs appeal from this order, which was made June 3d, 1862.

The main point made by the appellant is, that Green had actual notice of the pendency of the suit against his tenant; that he obtained possession from his tenant during the pendency of the action and after full notice; that he, in fact, defended the action in the name of his tenant, employed an attorney to defend, gave him instructions how to do so; that he consented, by and through his attorney, to the judgment; that he was, in fact, the real defendant—the real party in interest—and is therefore bound by the judgment, as much so as though he had been made a party to the suit and named in the judgment.

Under the system of practice before the adoption of the code, when an action was brought for the possession of land, against a person in possession as the tenant of another, the landlord was always admitted to defend. (*Stiles v. Jackson*, 1 Wend. 316; *Jackson v. Stiles*, 6 Cow. 594; *Den v. Fen*, 6 Halsted, 185; *Buford v. Gaines*, 6 J. J. Marshall, 34; *Jackson v. Stiles*, 4 Johns. 493.)

Sec. 13 of the Practice Act provides that "any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the question involved therein." Under this liberal provision, there is no doubt that the plaintiff could join as defendants both landlord and tenant, when they both claim adverse to him. And so, under Sec. 17 of the Practice Act, the Court, in a suit of that kind against a tenant, could direct that the landlord be made a party, in order to make a complete determination of the controversy. But if the landlord is not brought in as a party either by the plaintiff or the Court, he may make himself a party by complying with the law relating to interventions. In this case the landlord was not made a party to the record before judgment, either by the plaintiff or the Court, or upon his own

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application, and the question is, What is the effect of the judgment when he is not thus made a formal party to the record? "A judgment in ejectment authorizes the plaintiff to take possession of the premises, whoever may be in possession of them. The defendant in an ejectment suit cannot defeat the action by transferring the possession to another, either with or without consideration. Whoever succeeds to his possession succeeds also to the perils of the suit." (*Jackson v. Tuttle*, 9 Cow. 233.)

So a purchaser of the property from the landlord of tenants, against whom an action of ejectment is pending, is bound by the judgment for or against them. (*Jones v. Chiles*, 2 Dana, 25.)

It is a well established rule, that as to all persons who enter into the possession of premises under tenants on whom a notice had been served, in an action of ejectment for the same premises, no notice need be served on them, but they will be subject to be turned out of possession under the judgment. (*Smith's Lessee v. Trabue's Heirs*, 1 McLean, 87.)

A defendant cannot, by a transfer of his possession, *pendente lite*, defeat the action; the plaintiff may, notwithstanding, proceed to judgment and eject the assignee. If the law were otherwise, it would be in the power of the defendant to put the plaintiff to his new action as often as he thought proper to assign. (*Howard v. Kennedy*, 4 Ala. 592.)

Persons not parties to a suit, and in possession before it was brought, or those claiming under them, could not be ousted of their possession, because their distinct title had not been tried; but not so of tenants coming in under the landlord pending the suit. They are bound by the judgment on his title. (*Hickman v. Dale*, 7 Yerg. 149.)

In *Long v. Morton* (2 A. K. Marshall, 39) it was held, that persons in possession of land when a writ of *habere facias possessionem* is served, have a right to show that their possession is not under the defendant in the suit, but in virtue of a paramount title, and they would then be entitled to the interposition of the Court in their favor. But if they do not show how they claim, in the absence of all proof of the fact, it cannot be presumed that they held under a paramount title; and if they held under a defendant in the suit,

whether as lessees or as purchasers, as it appears they obtained the possession pending the suit, the decree is unquestionably obligatory upon them, as well as the defendant, and there is no principle or practice which would require a *scire facias* to be served on them before they could be turned out of possession.

“When a recovery is had against the occupant, the judgment binds not only him but all persons under whom he occupies, together with all persons in privity of estate or possession with himself. When a recovery is had against a tenant, the landlord is bound by it. So a recovery against a tenant in common who holds for himself and under the other tenants in common, is binding upon all his co-tenants, as well as himself. There is, therefore, no necessity for making any other than the occupant a defendant, to bind all persons in privity by a recovery.” (*Hanson v. Armstrong*, 22 Ill. 442.)

Ejectment was brought against a tenant, and the landlord was admitted to defend. He died pending the suit, and there was no revivor against his heirs, but the action proceeded and judgment was rendered against the tenant, and under it the widow and children of the landlord were dispossessed. It appeared that the landlord took possession after the commencement of the suit. The widow petitioned to be reinstated in possession, but the Court denied her application, holding that if the widow and heirs were not bound by the judgment as parties, yet they were subject to the operation of the writ of possession, because they came upon the land after the action was brought. All who enter upon the land pending the action of ejectment are subject to be removed by the final process. If this were not so there would be no advantage in a recovery or end to litigation. (*Wallin v. Huff*, 3 Sneed, 82.)

So one coming in as under-lessee to the defendant in an action of ejectment, during the pendency of the action, was held bound by the proceedings therein. (*Bradley v. McDaniel*, 3 Jones, 128.)

Similar decisions were rendered in *Jackson v. Stone* (13 Johns. 447); *Jackson v. Hills* (8 Cow. 290); 5 Taunton, 183; *Jackson v. Rightmyre* (16 Johns. 314).

The same principles have been heretofore substantially held by this Court in *Fremont v. Crippen* (10 Cal. 211), and in *Fogarty*

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v. *Sparks* (22 Id. 142), and are fully recognized by Sec. 263 of the Practice Act.

The counsel for the respondent has referred us to several cases on this subject which we will now proceed to notice. The case of *Peabody v. Phelps* (9 Cal. 213), was an action to recover damages for a fraudulent representation as to title made by the defendant, to the effect that he was the owner of the property and had purchased it of Larkin. Larkin afterwards sued the plaintiff for the possession of the land and recovered judgment therefor, and this judgment was offered as evidence against the defendant of paramount title in Larkin. The Court very properly held, that it was no evidence of that fact against the defendant, because he had no legal notice of the action; that mere cognizance of the existence of the action is not notice in the legal sense; that, to be available, the notice must apprise the party whose rights are to be affected of what is required of him, and the consequences which may follow if he neglect to defend the action. This is all correct when applied to that case. If a party to a suit has a right to resort to another upon his failure in the action, whether upon covenants of warranty, as in the case of *Peabody v. Phelps*, or on the ground that he is indemnified by such third party, as in the case of *Dutil v. Pacheco* (21 Cal. 441), then it is clearly his duty to give full notice to his covenantor or party who has agreed to indemnify him, of the pendency of the suit, what it is he requires him to do in the suit, and the consequences which may follow if he neglect to defend the action. Mere knowledge or information of the existence of such an action, is entirely insufficient to bind the party by the judgment. Unless the party to the action notifies him that he expects him to defend the action, or to furnish testimony, or to do some other act to aid in it, he may well suppose that the party is well prepared to defend it, has all the evidence necessary, and needs no assistance from him to defend his title or assert his rights; and he may well rely upon that supposition, for if the party desires his aid or assistance, it is his duty to give him full notice a reasonable time before the trial of the action to enable him to prepare for it. This doctrine in *Peabody v. Phelps* is just and right, and founded on well established principles of law; but it has no application to the pres-

ent case. Here was actual notice to Green of the pendency of the action, and he well knew what it was his duty to do, and the consequences to him if he failed. If he had sued his tenant for rent, and this judgment in ejectment had been attempted to be used in bar of that action, then the rule laid down in *Peabody v. Phelps*, respecting notice, would perhaps have had some application.

We are referred to *Ex parte Reynolds* (1 Caine, 499), in which it was held that a tenant who was in possession anterior to the action of ejectment, cannot be dispossessed by the writ of possession, unless he was made a party. This is a very good rule, but it does not apply to the present case; for here Green was not in possession at the time of the commencement of the action, except by his tenant who was made a party. Green, not being in actual possession at the commencement of the action, it was not *necessary* to make him a party; and when he did take the possession from the defendant, with full notice of the pendency of the action, he held that possession subject to the perils of the suit. The rule laid down in the case in 1 Caines' was recognized by this Court in the case of *Fogarty v. Sparks*, before referred to.

In the case of *Ryers v. Wheeler* (25 Wend. 437), in the Supreme Court of New York, and which was afterwards taken to the Court of Errors, and is reported in 4 Hill, 466, it was held that a landlord was not concluded by a judgment rendered against his tenant in an action of *which he had no notice*, when pleaded or offered in evidence *in a subsequent suit*. It will be readily seen that these cases do not relate to the point now before us. The case of *Ryers v. Rippey* (25 Wend. 431), depended upon the construction of a statute peculiar to the State of New York, and has no application to the present case. The question here is not as to whether Green will be concluded in any subsequent action to which he may be a party by the judgment in this case, or precluded from setting up a title not in fact litigated or determined in this action, which was the point in *Ryers v. Rippey*. But the point is, whether he was not properly dispossessed by the writ, under all the circumstances of the case. Indeed, it might well be urged, that having taken the burden of the defense of the action entirely upon himself, and having had full control of the defense in his own hands, he is not only

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liable to be dispossessed by the writ, but would be concluded by the judgment in any subsequent action to which he may be a party.

It is insisted that Green neither knew of nor assented to the entry of the judgment by consent, and therefore ought not to be held bound by it in any way. In his petition he does not assert that he did not know of or that he never assented to the entry of judgment. He merely says he had no legal notice of the action. The evidence shows conclusively that the attorney who appeared for the defense, and who filed the answer and consented to the entry of judgment, was employed and directed by Green, and not by the defendant. If he has suffered by any unauthorized action of his attorney, his remedy is against him, but the judgment cannot be disturbed on that account, unless fraud or collusion, or insolvency of the attorney is shown, which is not pretended in this case. (*Suydam v. Pitcher*, 4 Cal. 280; *Holmes v. Rogers*, 13 Id. 191; *Taylor v. Randall*, 5 Id. 79.)

The rule of law was well settled, that "every man is presumed to be attentive to what passes in the courts of justice of the State or sovereignty where he resides. And, therefore, a purchase made of property actually in litigation, *pendente lite*, for a valuable consideration, and without any express or implied notice in point of fact, affects the purchaser in the same manner as if he had such notice; and he will accordingly be bound by the judgment or decree in the suit." (1 Story's Eq., Sec. 405.) This rule sometimes operated as a hardship upon parties who had no actual notice, and the new Code of Practice (Sec. 27) provides, that the plaintiff or defendant may file a notice of the pendency of the action with the Recorder of the county in which the property is situated, and then provides, that "from the time of filing only shall the pendency of the action be constructive notice to a purchaser or incumbrancer of the property affected thereby." In no other respect are the rules of law relating to this subject changed by the statute. A purchaser or incumbrancer of property, instead of being required to examine all the suits pending in the several Courts to ascertain whether any of them relate to or affect the real estate he is negotiating about, has now only to examine the notices of *lis pendens* filed in the Recorder's office of the county where the real estate is

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situated, and he is only bound by constructive notice of what may there appear. The rules of law relating to actual notice of a pending action, and the effect of such actual notice upon parties dealing with or taking possession of property in litigation, are in no sense changed by this section of the Practice Act, but remain the same as before this law was passed. (*Richardson v. White*, 18 Cal. 102; *Bensley v. Mountain Lake Water Co.*, 18 Id. 306; *Head v. Fordyce*, 17 Id. 149; *Ault v. Gassaway*, 18 Id. 205.) In these cases the purchaser or incumbrancer had no actual notice, but the principle was clearly laid down, that the filing of the notice was intended as a substitute for the rule that the pendency of the suit was itself constructive notice; and as relating to the question of constructive notice, and not of actual notice. Green, in this case, had actual notice, which was better than the mere constructive notice resulting from a paper filed under this section of the statute, and he is as much bound by the judgment as if that law had been complied with.

The order made by the Court below is reversed, and the Court is directed to dismiss the petition of Green, and set aside all the proceedings under it.

McLAUGHLIN *et al.* v. KELLY *et al.*

IN an action for a trespass upon a mining claim, where the complaint avers that defendants are working upon and extracting the mineral from the claim, and prays for a perpetual injunction, and the answer admits the entry and work and takes issue upon the title; if a jury to whom the issue of title is submitted find in favor of the plaintiffs, it is the duty of the Court to decree the equitable relief sought, and enjoin defendants from future trespasses.

The complaint charged that defendants had wrongfully entered upon a tract of mining ground (described by metes and bounds) owned by the plaintiffs, and had extracted therefrom gold-bearing earth of the value of \$1,000, and that they threatened to continue their wrongful acts, and prayed for damages in the sum of \$1,000, and for a perpetual injunction. The answer set up title in defendants to a specific portion of the tract claimed by plaintiffs, and denied that they had worked upon any other portion than that to which they thus asserted title.

The jury under a general submission found "a verdict in favor of plaintiffs with one dollar damages:" held, that the verdict decided the question of title in

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favor of plaintiffs, and that upon it they were entitled to a decree perpetually enjoining defendants from working upon the ground claimed in the complaint; that this equitable relief was a matter of right, the denial of which by the District Court was error.

The Court in the case above cited having instructed the jury that, if they found that plaintiffs were entitled to the mining ground, they must find a verdict for \$1,000 damages upon the admissions of the answer: *held*, that because the jury brought in a verdict for one instead of one thousand dollars' damages, it was not therefore to be concluded, in direct opposition to their general verdict, that they did not find the title in the plaintiffs. The damages being admitted by the pleadings were not in issue, and the verdict in that respect was immaterial.

It is no reason for refusing a perpetual injunction in an action of trespass in which the title has been litigated, that defendants will thereby be precluded from asserting their title in any other form of action. When there has been a fair trial of an issue of fact, Courts give the verdict and judgment a conclusive effect, and will not permit the parties to relitigate the same matter in another suit.

Where in an action of trespass the jury find generally "for the plaintiffs," it is a finding upon all the issues raised by the pleadings material to a recovery by the plaintiffs, and concludes the parties upon a question of title where it was distinctly put in issue.

Under our code of practice to ascertain what was in fact determined by the findings or verdict, we must look solely to the material facts put in issue by the pleadings, and not to the form of the action.

The mere fact that the pleader has used terms of expression in stating his case which were under the old system of practice used in particular kinds of action, will not necessarily give character to, or determine the effect or meaning of, the verdict.

APPEAL from the Seventeenth Judicial District.

The nature of the action and the character of the issues raised by the pleadings are fully stated in the opinion. The form of the allegation of damage in the complaint, following a description of the entire premises claimed by them, is that defendants "then and there," with picks, etc. "dug, mined out, removed, and converted to their own use, divers large quantities of gold and gold-bearing earth, and gravel of great value, to wit: of the value of \$1,000," to the damage of plaintiffs in that sum. The only reference to the subject of damage in the answer, is a denial that defendants have done any work west of the line as claimed by them.

The statement of the evidence on the trial, as set forth in the record, is as follows: "Whereupon a jury was regularly impan-

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neled to try the cause, and the parties respectively introduced testimony in support of the issues on their part. It was in evidence, that defendants had worked and mined in that part of the mining ground claimed in the complaint and replication, and lying east of the Carter line, running north fifty-seven degrees and forty-five minutes west (the line claimed by defendants). There was evidence tending to prove that defendants had run an air tunnel through a portion of plaintiffs' ground west of said Carter line, and that this last mentioned tunnel was run by the consent of the plaintiffs; also, that in working along said line, the defendants had in several places broke over the same and caved down a little dirt from the west side thereof, and at the same time, plaintiffs told defendants they need not be very particular about the line, or about going over the line."

The instructions were almost entirely directed to questions respecting the title to the triangular piece of ground put in issue by the pleadings. In each of three instructions, given at request of defendants, the jury were told that, upon a certain hypothesis of facts respecting title to the triangle above mentioned, they must find for defendants, "unless they find that defendants worked on the west side of the Carter (N. 57° 45' W.) line." On the subject of damage the Court instructed as follows: "The answer in this case admits that the defendants have extracted gold of the value of \$1,000 from the ground claimed by plaintiffs in their complaint, and during the time therein alleged, and if the jury believe from the evidence that plaintiffs at the time of the alleged trespass were entitled to the possession of such ground, they should find a verdict in favor of plaintiffs for \$1,000 damages."

The verdict was as follows: "We the jurors in the case of *Chas. McLaughlin v. Peter Kelly et al.*, do find a verdict in favor of the plaintiffs, with one dollar damages.

L. W. KEYES, Foreman."

Taylor & Cowdery and Will Campbell, for Appellants.

I. The jury found a general verdict in favor of plaintiffs, which included all the issues, and therefore entitled plaintiffs to the equitable relief prayed for.

"A general verdict is that by which they (the jury) pronounce

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generally upon all or any of the issues." (Prac. Act, Sec. 174.) Where there is more than one issue, and all the issues are submitted to the jury, it is their duty to pass upon all, and the Court will, when the verdict is general, presume that the jury did find upon all the issues. (*Brockway v. Kinney*, 2 Johns. 210.) In *Chapman v. Smith* (16 How. 133), where there were fourteen counts, the Court said: "The omission to levy upon the goods, or to sell after the levy, fell directly within the issue, * * * and we are bound to presume were the subject of examination before the Court and jury, and were passed upon by them." The issues in this case stand precisely as if the complaint contained two counts, one for trespass on the ground east of the line fifty-seven degrees and forty-five minutes, and one for trespass west of that line, and the defendants had pleaded to the first count, *liberum tenementum*, and to the second the general issue. Now, supposing one of these counts to have been bad, and the other good; the rule in this country is, that if any of the counts are good, it shall be presumed the damages were assessed on those counts, and the verdict shall stand. For if the defendant wishes to question the sufficiency of any of the counts, he may demand separate verdicts upon each count, and unless he do so, the general verdict shall be conclusive against him. (*Wolcott v. Coleman*, 2 Conn. 337; *Stamford Bank v. Ferris*, 17 Id. 259.)

II. Although formerly, in the Courts of Chancery, the finding of a jury upon an issue was not binding upon the Chancellor; yet wherever the foundation of a claim was a legal demand, the Court would order a trial at law (2 Daniel's Ch. Pr. 445), and the result was regarded as conclusive. (*Booth v. Blundell*, 19 Ves. 500.) Pending the trial the Court would restrain all injurious proceedings, and when the right was so established would decree a perpetual injunction. (2 Story's Eq. Jur. Sec. 927; Id. Sec. 1478; *Livingston v. Van Ingen*, 9 Johns. 569, and Chancellor Kent's opinion therein, 585.) In this State, however, the Chancellor's (Judge's) discretion in the matter is regulated and qualified by the statute; the equitable relief prayed for must follow the verdict for plaintiff (if consistent with the case), unless the defendant move for and obtain a new trial. (*Duff v. Fisher*, 15 Cal. 379, *et seq.*)

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The granting of a temporary injunction rests in the sound discretion of the Court (Willard's Eq. Jur. 341, and cases there cited), but a decree of perpetual injunction may be a matter of strict right. (*Ogden v. Kip*, 6 Johns. Ch. 160; *N. Y. Printing and Dyeing Estab. v. Fitch*, 1 Paige's Ch. 98; 3 Daniell's Ch. Pr. 188; *Mitchell v. Dorr*, 6 Ves. 147; *Crockford v. Alexander*, 15 Id. 138; *Thomas v. Oakley*, 18 Id. 186.)

III. The record shows that the issue of *liberum tenementum* as to the ground between the lines forty-eight degrees and forty-five minutes and fifty-seven degrees and forty-five minutes, was tried and found in favor of plaintiffs; the defendants admit the plaintiffs' title to the ground west of the line fifty-seven degrees and forty-five minutes. The plaintiffs are therefore entitled to a perpetual injunction restraining defendants from working or mining upon any portion of the ground described in the complaint. (*Mitchell v. Dorrs*, 6 Ves. 147; *Smith v. Collyer*, 2 Id. 90; *Gray v. Duke of Northumberland*, 17 Id. 281; 2 Story's Eq. Jur., Sec. 929; *Merced Mining Co. v. Fremont*, 7 Cal. 320, *et seq.*; *Henshaw v. Clark*, 14 Id. 464.)

It is contended that taking the pleadings alone, in connection with the verdict, we cannot determine that the jury necessarily decided that plaintiffs had made out title to the disputed ground, for that it might be the trespass was committed upon the portion of their ground, the title to which was not controverted. The plea as to the disputed portion is *liberum tenementum*, which of course denies the title, and admits a *prima facie* trespass; and a verdict upon this plea necessarily decides the title; in other words, the jury must necessarily have found the title to be in plaintiffs, before they could find a verdict in favor of plaintiffs, for damages. Therefore, this issue having been tried in this case, and the verdict being in favor of plaintiffs, defendants would in another suit be estopped from denying plaintiffs' title.

IV. It would not avail defendants anything, in another action in relation to the gore between the lines forty-eight degrees and forty-five minutes and fifty-seven degrees and forty-five minutes, to say that upon the pleadings in this case two issues were made, and that the verdict of the jury might have been based upon that part

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of the defense which raises the general issue. In such suit these plaintiffs would have a right to show by parol that in this case the issue of title was tried. The rule is this: in order that a judgment in one action shall be conclusive in another, it must appear with convenient certainty that the question in controversy in the second suit was litigated and decided in the first. Where this is apparent on the face of the proceedings, in the former action, the mere production of the record will be enough; but where it is not, it may be shown by parol evidence, if the record show that the same matter might have come in question in the former suit. (*McKnight v. Dunlap*, 4 Barb. 44; *Beebe v. Elliott*, Id. 459; *Briggs v. Wells*, 12 Id. 569; *Davis v. Talcott*, 14 Id. 619; *Lawrence v. Hunt*, 10 Wend. 85; *Young v. Rummell*, 2 Hill, 481; *Doty v. Brown*, 4 Comstock, 75; *Birckhead v. Brown*, 5 Sandf. 145; *Rogers v. Libby*, 35 Maine, 200; *Gray v. Gillilan*, 15 Illinois, 453; *Baker v. Rans*, 2 Gilman, 355; *Stuker v. Butler*, 17 Alabama, 133; *Young v. Black*, 7 Cranch, 567; *Chapman v. Smith*, 16 How. 133; *Duchess of Kingston's Case*, 11 State Trials, 261, cited in 2 Smith's Leading Cases, 676, *et seq.*)

We have shown conclusively that the title of the ground east of the line fifty-seven degrees and forty-five minutes and west of the line forty-eight degrees and forty-five minutes was actually in issue in this case, and that each issue was actually tried, and found in favor of the plaintiffs.

Vanclief & Bowers and A. I. Williams, for Respondents.

I. The perpetual injunction asked for, would conclusively settle the title to all the ground described in plaintiffs' complaint in favor of the plaintiffs (appellants here), and forever preclude and estop the defendants from disputing it, or recovering any portion of the ground in any other action. The verdict of the jury was general and assessed the damages at one dollar. For all that appears, the basis of this verdict may have been a trespass on that portion of the ground west of the Carter line, as to which the defendants merely denied the trespass but claimed no title; and, that it was so, the record discloses strong reasons for believing; 1st, the evidence showed a technical trespass west of the Carter line, for which

more than nominal damages might have been given. Defendants had broken over that line, and caved down dirt in several places, and had run an air tunnel west of said line; 2d, on the motion of plaintiffs, the Court instructed the jury, that the answer of defendants admitted that defendants had taken gold of the value of \$1,000 from the ground in dispute, and that if they believed that plaintiffs were entitled to the possession of such ground, they should find a verdict in favor of plaintiffs for \$1,000. This of course refers to the ground east of the Carter line as to which defendants pleaded title in themselves. If, then, the jury found the plaintiffs were entitled to the ground east of said line, they must have disregarded this positive instruction of the Court, as they assessed the damages at one dollar only; 3d, the record shows that it was granted by defendants and understood by the Court and jury at the trial, that the jury might find from the evidence a trespass by the defendants on the west side of the Carter line, for such a contingency was provided for and expressed in each one of the three instructions asked by the defendants which were given by the Court.

It would be sufficient for our purposes if it appeared uncertain whether the verdict of the jury was predicated upon a finding of the title in the plaintiffs as to all the ground described in their complaint east of the Carter line, but from the foregoing considerations it is made to appear morally certain, that the sole ground of the verdict was the finding of a technical trespass on the west side of said line, for which they gave merely nominal damages.

We claim the law applicable to this case in the view above taken to be that expressed in the opinion of the Chancellor in *Wood v. Jackson* (8 Wend. 36), as follows: "A verdict cannot be urged as an estoppel to the litigation of a fact, which was not absolutely necessary to the finding of the verdict in the previous suit. And the Court will never go into an examination of the jurors in the former cause to ascertain upon what grounds their verdict was pronounced. Neither will a verdict be considered as an estoppel merely because the testimony in the first suit was sufficient to establish a particular fact." (See also *Davis v. Talcott*, 14 Barb. 612; *W. A. & G. S. P. Co. v. Sickles et al.*, 24 How. 333; *Kidd v. Laird*, 15 Cal. 182.)

The rule was extended to its utmost limits in *Birckhead v. Brown* (5 Sanf. 134) where Mr. Justice Duer expresses it as follows: "It is that as between the parties and privies a judgment is conclusive as to every question upon which the right of the plaintiff to recover, or the validity of a defense in another suit, is found to depend, and upon the determination of which it appears from the record, or is shown by extrinsic proof that the judgment was in reality founded."

Counsel for appellants invokes the rule which supports a general verdict on several counts where only one of such counts is good. The reason for this rule is, that it does not appear that the verdict was rendered on the bad counts, and for the purpose of supporting it and giving it effect the law will refer it to the good count. If in such case, it could be made to appear certain that the verdict was solely on the bad count, judgment upon it would be arrested, as in case of a declaration wholly bad.

These reasons do not support the rule contended for in this case. Here, the verdict is supported and takes its legal effect without the perpetual injunction; and if it be uncertain whether the jury passed upon the issue of title, or if so, to what extent, or whether they found it in favor of plaintiffs or defendants, surely it should not be conclusively assumed that they found it wholly against the defendants for the purpose of perpetually enjoining them from entering on any portion of the premises.

II. But another and different view of the case will dispose of it in favor of the respondents. Admitting for the argument, that the plea of *liberum tenementum* applied to the whole of the close described in the complaint, or that there had been no issue as to that portion of the ground west of the Carter line, still the general verdict for plaintiffs would not conclusively, or even *prima facie* establish their title to the whole of the ground covered by the terms of the plea.

The *locus in quo* is a divisible allegation, and although the plea of *liberum tenementum* be applied generally to the whole of it, proof that the part in which the trespass was actually committed was the freehold of the defendant, will be a good defense, although the title to the other portions of it is shown to be in the plaintiff;

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and a failure of defendant to prove title to that particular part in which the trespass was committed, will entitle the plaintiff to recover, even though it be proven that all other portions of the *locus in quo* is the freehold of the defendant. (2 Greenl. Ev. Sec. 626; *Rich v. Rich*, 16 Wend. 665; *King v. Dunn*, 21 Id. 253; *Dunkle v. Wiles*, 5 Denio, 299; *Same case*, 1 Kern. 421; *McDonald v. Bear River W. Co.*, 15 Cal. 147.)

Suppose it had appeared to the jury that the trespass for which they assessed the damages was committed on a very small portion only of the ground as to which defendants pleaded title, and at the same time that defendants were entitled to all other portions of that ground, must not the verdict have been for the plaintiffs?

There is a plain distinction between this case and such cases as *Brockway v. Kinney* (2 John. 210) and *Chapman v. Smith* (16 How. 133) cited by appellants' counsel. To do this it is only necessary to observe the difference between the issue raised by a plea of *liberum tenementum* in actions of trespass *quare clausum fregit*, and the issues in the cases cited. In the former, the substance of the issue only relates to that specific part, or spot of the *locus in quo* as described in the declaration, in which the alleged trespass was actually committed; whereas, in the latter, the substance of the issues extends to all that is alleged and denied. In the former, the allegations include much that is immaterial and not of the substance of the issue; while in the latter, the substance of the issue is as broad as the language of the pleading, and extends to the extreme boundary of each allegation.

In the case of *Brockway v. Kinney*, the plaintiff in the former suit had declared on a promissory note, and also for work and labor, and of course the allegations of the making and delivery of the note, the sum alleged to be due upon it, also every day's work and every dollar of the price, or value of it, if denied by the plea, were of the substance of the issues, and must have been passed upon by the general verdict of the jury.

But, in an action of trespass *quare clausum fregit*, the allegation of the complaint may be, that the trespass was committed on one hundred acres, particularly describing it, and the answer, that the said one hundred acres is the soil and freehold of the defendant,

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and a replication completely traversing the answer. Yet, if it appear from the evidence, that the actual trespass was only committed on one acre, the substance of the issue of title is confined to that one acre, and determines the title to it alone.

CROCKER, J. delivered the opinion of the Court—COPE, C. J. and NORTON, J. concurring.

The complaint in this case avers that the defendants unlawfully entered upon certain mining ground owned by the plaintiffs and in their possession, and mined out, removed, and converted to their own use large quantities of gold and gold-bearing earth, of the value of \$1,000; that the defendants have no right to said mining ground, but are wanton trespassers thereon; that they are still mining the ground, the sole value of which consists of the gold therein; that, unless restrained, they will mine out the best and most valuable portion of the ground before the determination of the suit; and concludes with a prayer for judgment for \$1,000, for a temporary, and on the final hearing, a perpetual injunction, and for general relief. The answer of the defendants denies that the plaintiffs ever were the owners or in the possession of the *whole* of the mining ground claimed in the complaint, or of any portion upon which they, the defendants, have ever mined, or from which they have ever removed any gold or gold-bearing earth of any value; they aver that they are the owners and in possession of certain mining ground in the same vicinity which they describe, and then deny that they have ever mined or removed any gold-bearing earth from any part of the ground described in the complaint, except so much thereof as may be within the boundaries of their own claims, to which plaintiffs had no right, title, or possession. The replication denies that the defendants owned or possessed the premises described in the answer, or any portion thereof, except such portion as may lie easterly of a line drawn from a certain stake, mentioned in the description of defendants' mining ground, and running north forty-eight degrees forty-five minutes west by magnetic meridian, but on the contrary plaintiffs are the owners and possessors of the ground lying westerly of said line. The pleadings are duly verified. The cause was tried by a jury, who found "a verdict in

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favor of the plaintiffs, with one dollar damages." A temporary injunction had been granted at the commencement of the suit. The Court rendered a judgment in favor of the plaintiffs for one dollar, without costs, and ordered the temporary injunction to be dissolved. The plaintiffs asked the Court to render a judgment upon the verdict for one dollar, with costs, and for a perpetual injunction against mining the ground described in the plaintiffs' complaint, which was refused by the Court, and to which the plaintiffs excepted, and they prosecute this appeal from the order dissolving the temporary injunction and the refusal to grant the perpetual injunction.

It appears that these parties own adjoining mining grounds, and that the premises in dispute is a gore of land lying between the undisputed portions of their respective claims, the plaintiffs' claim lying westerly and the defendants' easterly of this gore. This disputed piece of land lies between two lines, both commencing at a certain stake, the one line running from this stake north forty-eight degrees forty-five minutes west, and the other north fifty-seven degrees forty-five minutes west, a difference of nine degrees; the plaintiffs claiming that their mining ground extends to the former line, while the defendants claim that theirs extends to the latter line. This issue is clearly, plainly, and distinctly presented by the pleadings, and the plaintiffs contend that as the verdict was for them this issue was found by the jury in their favor; that they were therefore entitled to a perpetual injunction restraining the defendants from mining upon any portion of the ground described in their complaint, and that the Court erred in refusing it. A careful examination of the pleadings clearly shows that the question of ownership of this gore of land was, in truth, the main fact in issue in the case. All the other material allegations were not denied, and were therefore admitted. Even the question of damages, which was passed upon by the jury, was not in issue, because the allegation of the complaint on that point was not specifically denied by the answer. The plaintiffs averred that they were the owners of a certain tract of mining ground, describing its boundaries, which include the gore in controversy; the defendants deny that the plaintiffs are the owners of this gore, and aver that they own a piece of mining land, describing it, which includes it. If a

question of ownership and title was ever put in issue in any case, they certainly were in this; and when the jury by their verdict found for the plaintiffs, they clearly found this issue for them. None of the allegations in the complaint on which the injunction prayed for is founded are denied by the answer, and they are therefore admitted; and the only issue of fact being found for the plaintiffs, they were clearly entitled to that relief.

But it is objected by the respondent that the perpetual injunction would conclusively settle the title to all the ground described in the plaintiffs' complaint in favor of the latter, and forever preclude and estop the defendants from disputing it, or recovering any portion of the ground in any other action, and therefore it ought not to be granted. Very probably such would be the result. Such is usually the result of trials where a question of fact, material to the determination of the suit, has been fairly tried and a verdict and judgment has been rendered thereon. The principal object of actions is to produce just such a result; that is, to finally settle the controversy and put an end to litigation and strife. When there has been a fair trial of such an issue, Courts usually give the verdict and judgment a final and conclusive effect, and will not permit the parties, or those claiming under them, to relitigate the same matter in another suit. (*Loring v. Ilsley*, 1 Cal. 28; *Soule v. Dawes*, 14 Id. 248; *Kid v. Laird*, 15 Id. 162; *McDonald v. The Bear River and Auburn Water and Mining Co.*, Id. 145; *Robinson v. Howard*, 5 Id. 428; 2 Phillips' Evidence, C. H. & E.'s Notes, 18, notes 261, 262).

It is also urged that the verdict of the jury *may* have been founded upon other matters than the ownership of the gore of land in controversy; and this is more especially insisted on because the jury found only one dollar damages. The finding of the jury "for the plaintiffs" was upon all the issues in the pleadings, and, as we have shown, the only issue upon any material fact was as to the ownership and possession of this particular strip of land, and this verdict was clearly against the defendants upon that matter. As to the amount of damages found by the verdict, it was entirely immaterial and surplusage. There was no issue upon the question of damages presented by the pleadings for the jury to try, and that

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part of their verdict was, therefore, upon a matter not properly before them. The answer not containing any specific denial of the amount of damages alleged in the complaint, those allegations were therefore admitted, and there was no issue upon that question. We have no right to say that the jury founded their verdict upon matters not in issue. So with regard to the instruction of the Court that, if the jury should find that the plaintiffs were entitled to the mining ground they must find a verdict for \$1,000 damages upon the admissions of the answer. That instruction was upon an irrelevant and immaterial matter, one not for the jury to act upon. The amount of damages being admitted by the answer took that question entirely from the jury. Because the jury did not bring in a verdict for \$1,000 damages, in accordance with that instruction of the Court, we are not therefore to conclude that they did not find that the plaintiffs were entitled to the mining ground in dispute, in direct contradiction to their verdict.

The question before us is not as to the conclusiveness or effect of this verdict upon the issues presented by the pleadings, or the judgment which may be rendered upon the verdict, as an estoppel or bar in another action, but simply what relief, or what kind of a judgment the plaintiffs are entitled to under the pleadings and verdict; whether they are entitled to such relief as will quiet and settle the controversy about this mining ground, or whether they shall be compelled to bring repeated suits for each trespass which may be committed by the defendants. We are clearly of opinion that under the pleadings and verdict they are entitled to the relief by perpetual injunction, as prayed for in the plaintiffs' complaint.

It is also urged that the form of the action is to govern in questions of this kind. We are aware that under the old system of practice the conclusiveness and effect of general verdicts, and the judgments rendered thereon, depended very much upon the particular *form* of the action. But our Practice Act abolishes all these *forms*, and provides that "there shall be in this State but one form of civil actions for the enforcement or protection of private rights, and the redress or prevention of private wrongs." And the pleadings are merely required to set forth a statement of the facts constituting the cause of action or defense "in ordinary

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and concise language.” It has become a common practice to follow and use, to some extent, the form of allegation of facts formerly used in the different kinds of actions under the old system ; but such use cannot vary the uniform rule which must be applied to all pleadings under the new code. We must now look solely to the material facts put in issue by the pleadings, to ascertain what was in fact determined by the findings of the Court or the verdict of the jury. The mere fact that the pleader has used terms of expression in stating his case used in particular kinds of action, under the old system of practice, will not necessarily give character to or determine the effect or meaning of the verdict. It is therefore unnecessary to investigate this question by an examination of the cases founded upon these old distinctions of the different forms of actions.

The orders appealed from are therefore reversed and the Court below is directed to enter judgment for a perpetual injunction, in accordance with this opinion.

DODGE v. WALLEY *et al.*

DEEDS are always to be construed most strongly against the grantor when there is any uncertainty or ambiguity in their terms.

It is the duty of a Sheriff, under an execution, to levy upon and sell the property and all the right, title, and interest of the debtor therein ; and where a deed made by him in pursuance of such sale expressly conveys all of the debtor's right, title, and interest, the purchaser's title to the same will not be prejudiced by the fact that in attempting to describe the nature of the interest the officer through ignorance or mistake failed to set it forth fully and correctly.

In an action by a purchaser at execution sale to recover the premises from one who previous to the sale had conveyed them to the execution debtor by a warranty deed, the defendant is estopped from asserting any title and cannot avail himself, by way of defense, of any defect in the description of the property in the Sheriff's deed to the plaintiff.

A person who conveys property by warranty deed, and remains in possession, is not entitled to notice to quit or demand of possession from his grantee or those claiming under him before the commencement of an action to eject him.

A Sheriff's deed to the purchaser at an execution sale described the property as follows : “ All the right, title, and interest of said Daniel S. Clark, against whom the said writs of execution were issued as aforesaid, of, in, and to the

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following described property, to wit : That certain tract and parcel of land and premises known as the 'Bull Head Rancho,' lying and being situate in Contra Costa County, of said State, *and being a leasehold unexpired,*" etc., proceeding to describe particularly a certain leasehold interest. At the time of the sale the execution debtor was, in fact, the owner in fee of the premises : *held*, that the fee passed to the purchaser—the recital concerning the leasehold interest not operating as a limitation of the preceding general terms of description.

APPEAL from the Fourth Judicial District.

The facts are stated in the opinion.

M. S. Chase, for Appellant.

I. The return and indorsements of the officer upon the writ of execution are presumptively true, and they show that only a leasehold interest was sold. (*Cloud v. El Dorado Co.*, 12 Cal. 133.)

II. From the deed it appears that the officer actually sold only the leasehold interest, and intended to convey that and no more, and this being so, the general words in the deed descriptive of a different and larger estate should be rejected as surplusage. (*Jackson ex dem. v. Jones*, 9 Cow. 182.)

III. Walley having, after his conveyance to Clark, remained in possession with Clark's consent, was a tenant at will and entitled to demand and notice to quit before the commencement of this action to eject him.

Thomas A. Brown, for Respondent.

I. Walley by warranty deed conveyed the premises in controversy to the defendant, Clark, for a valuable consideration, and now refuses to deliver up the possession, and claims the premises in opposition to his own warranty deed. If this suit had been brought by Clark against Walley he could make no defense whatever, his deed would estop him. (1 Green. Ev. Secs. 22, 24 ; *Jackson v. Bull*, 1 Johns. Cases, 90, 91 ; *Tarter v. Hall*, 3 Cal. 266.)

Nor is the appellant in any better position as the case stands, the plaintiff claiming under a conveyance from Clark. Clark had the right to dispose of the title or possession of the premises at any time after the conveyance to him by Walley, and Walley could not be permitted to question that right.

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II. Nor is he entitled to notice to quit before suit brought.

Notice to quit is not necessary when the relation of landlord and tenant does not exist. (*Kibbam v. Ritchie*, 2 Cal. 148.)

The relationship of landlord and tenant does not exist between vendor and vendee so as to entitle the vendor to notice to quit, and even if the relationship had existed between Clark and Walley, such relationship was destroyed by the sale of the premises by the Sheriff to Terry and Perley. (*Jackson ex dem. Bowen v. Burton*, 1 Wend. 344.)

Again, the defendant, Walley, having in his answer in this case denied the plaintiff's title, and set up an adverse title in himself, he cannot be permitted to deny the plaintiff's title and at the same time claim the benefit of notice to quit before suit brought as if he were holding in subordination to it. (*Smith v. Ogg Shaw*, 16 Cal. 90.)

III. The rule is well settled that the title of a purchaser of property at Sheriff's sale does not depend on the return of the officer, and that he need show no return, nor will it affect him though the return made be incorrect. The purchaser has no control over the officer or his return; he cannot compel the officer to make any return, or to correct one made incorrectly. It is enough for the purchaser that the officer had authority to sell and did sell to him and execute a deed. (*Jackson v. Sternberg*, 1 Johns. 155; *Cloud v. El Dorado Co.*, 12 Cal. 128; *Jackson v. Stevens*, 1 Johns. 153; *Wheaton v. Sexton*, 4 Wheat. 503, 506; *Mitchell v. Lupe*, 8 Yerg. 179; authorities collected in Cowan & Hill's Notes to Phil. Ev. 805, Part 2.)

When the Sheriff's deed recites a levy or sale, such recital cannot be contradicted, the deed stands as if made by the party himself. The Sheriff as the attorney of the party derives the power from the judgment and execution, and is appointed by law to sell and convey, and his deed stands on the same footing with the deed of the party himself. (*Cooper's Lessees v. Galbroth*, 3 Wash. C. C. 546.)

IV. If the officer had levied on and sold, and intended to convey the remainder or unexpired term of a lease for years, he would have so stated in his deed, and he would have described the par-

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ticular estate he intended to convey, but on the contrary he distinctly states several times in his deed that he levied on, sold, and conveyed to the purchasers all the defendant, Clark's, right, title, and interest in the premises, and the reference made in the deed to the Steinberger lease, and also to the articles of agreement with Smith, was made to identify the land conveyed and not for the purpose of limiting or qualifying the estate granted.

CROCKER, J. delivered the opinion of the Court—COPE, C. J. concurring.

This is an action to recover the possession of a tract of land in Contra Costa County. The plaintiff recovered judgment, from which the defendants appeal. The plaintiff claims title through a deed from the Sheriff of said county to Terry and Perley, in which the property conveyed is described as follows: "All the right, title, and interest of said Daniel S. Clark, against whom the said writs of execution were issued as aforesaid, of, in, and to the following described property, to wit: That certain tract and parcel of land and premises known as the 'Bull Head Rancho,' lying and being situate in Contra Costa County of said State, and being a leasehold unexpired, originally granted by the heirs of Wm. Welch, deceased, and others, to John B. Steinberger, and from said Steinberger by succession of title to said Clark, and at the date of said levy of said writs in the possession of John F. S. Smith, reversional to said Clark as per a certain contract and agreement on record in the Recorder's office of said last named county, in Book of Deeds, Vol. 3, pages 208, 209—reference thereto being given for particulars, and also to the said original conveyance of lease to the said Steinberger." It appears that long before the rendition of the judgments and the executions thereon against Clark, under which this property was sold, Walley, who is the sole appellant, conveyed the same property to Clark. Terry and Perley conveyed to the plaintiff. Clark was originally a party defendant, but he died during the pendency of the action. Carr, his executor, was made defendant in his stead, and by stipulation between the plaintiff and Carr, the separate answer of Clark was withdrawn, and judgment allowed to be entered against him, leaving Walley the sole defendant.

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The principal point in the case is the construction of the Sheriff's deed to Terry and Perley, Walley claiming that it only conveyed the unexpired leasehold interest under the lease to Steinberger; that that interest had expired, and therefore the plaintiff had no title or right to the possession. On the contrary, the plaintiff contends that the Sheriff's deed conveyed all the right, title, and interest of Clark in the land, and that thus whatever interest Clark may have held under the lease, as well as under the deed from Walley, all passed to the grantees in that deed, and afterwards from them to him. We think this is the proper construction of the deed. It distinctly conveys "all the right, title, and interest of the said Daniel S. Clark" in and to the ranch. If it stopped here, there could be no room for doubt as to its meaning. To this point it clearly conveys all the interest of Clark in the property, which would carry the interest he acquired from Walley and every other person. The latter part of the description, where it says "being a leasehold unexpired," etc., are not words *limiting* the extent of the previous terms of conveyance, or *excepting* out any interest conveyed by the previous terms; but merely a statement of the officer and grantor of what he supposed or understood was the nature and character of the interest of Clark. He uses no terms limiting or confining his conveyance to such unexpired leasehold interest. If he had used such terms it would have presented a case of greater difficulty; but in the absence of language qualifying or limiting the general terms conveying all his interest, we would not be justified in restricting the conveyance as contended for by the appellant. Deeds are always to be construed most strongly against the grantor when there is any ambiguity or uncertainty. In this case it was the duty of the Sheriff under the law to levy upon and sell all the right, title, and interest of the debtor, Clark, in the property, and he seems to have performed his duty; and the mere fact that the Sheriff in attempting to describe the nature of that interest failed, through ignorance or mistake, to set forth fully all the interest he had, cannot prejudice the rights of the purchaser who purchased all that interest. It is doubtful, too, whether Walley can avail himself of any objection of this kind, and whether any person but Clark, or his successor in interest, could do so. Walley had conveyed

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the property to Clark, and as against Clark, and all claiming under him, he is estopped by his deed from asserting any title. Clark, by his will, conveyed all his property, both real and personal, to Carr, his executor, who appeared and filed the following stipulation: "I hereby withdraw the separate answer of D. S. Clark in the above entitled suit, and as testamentary heir of said Clark, agree to the plaintiff's taking judgment." So that Carr, the devisee of Clark, is also estopped from making the objection.

The respondent also claims that he was a tenant at will of the premises, and was entitled to demand of possession and notice to quit. He asserts nothing of the kind in his answer; but, on the contrary, denies the plaintiff's title. Besides, he conveyed all his title to the property by warranty deed to Clark. Under these circumstances he was not entitled to any notice to quit, nor was any demand of the possession necessary before suit. (*Kilburn v. Ritchie*, 2 Cal. 145; *Smith v. Ogg Shaw*, 16 Id. 88.)

The judgment is affirmed.

LEVINSON v. SCHWARTZ *et al.*

In pleadings, statements of mere conclusions of law are insufficient; the facts from which the conclusion is to be drawn must be stated.

In an action of assumpsit, for goods sold and delivered, after a submission of the case upon the pleadings, defendants asked leave to amend their answer, which as it then stood raised no issue, by averring that the goods were purchased "on credit," and that the "term of credit" had not expired, which the Court refused: *held*, that the refusal was proper, as the averment proposed was only a conclusion of law, and therefore immaterial.

A general denial of the averments of a verified complaint with the qualifications of "except as hereinafter admitted," is insufficient to put in issue any of its allegations.

After an admission of the indebtedness charged in a complaint in assumpsit, a denial of the alleged promise to pay is immaterial. From the indebtedness admitted the law implies a promise to pay, and the denial of any express promise raises no issue that requires proof on the part of the plaintiff.

APPEAL from the Fourth Judicial District.

The facts are stated in the opinion.

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M. Compton, for Appellant.

To the point that the amendment to the answer should have been allowed, cited: (*Loucks v. Green*, 99 Eng. Com. Law, 370; *Lea-trade v. Barth*, 17 Cal. 285; *Roland v. Humphrey*, 18 Id. 455; 4 Duer, 228; 9 Cal. 56;) and that the denials in the answer raised a material issue, cited: (*Walrad v. Bennett*, 6 Barb. 144).

Shafter, Heydenfeldt & Goold, for Respondents.

CROCKER, J. delivered the opinion of the Court—COPE, C. J. concurring.

This is an action to recover the sum of \$1,724 86, upon an account for goods sold and delivered. The complaint is in the usual form, and is sworn to. The answer denies that at the time stated in the complaint, or at any other time, they were indebted to the plaintiff in the sum of \$1,724 86, or any other sum for goods, wares, and merchandise, or otherwise, before that time, sold and delivered, except as hereinafter admitted, and they also deny any promise to pay. The answer then admits that they purchased goods of the plaintiff of the value of \$1,512 42, and of Levinson & Brother of the value of two hundred and twelve dollars and forty-four cents, and that they are informed and believe that the plaintiff is not the sole owner of the claim, and is not entitled to recover without joining one Levinson with him; that plaintiff is not the real party in interest, but it is prosecuted for the benefit of Levinson & Brother. When the case was called for trial a jury was impaneled, and both parties submitted the case upon the pleadings. The defendants then asked leave to amend their answer, so as to aver that the goods were purchased "on credit," and that such "term of credit" had not expired. The Court refused to allow them to amend, to which they excepted. The Court instructed the jury that under the pleadings the plaintiff was entitled to a judgment for the sum claimed and interest, and a verdict and judgment were rendered accordingly, from which the defendants appeal.

The first assignment of error is that the Court ought to have permitted the defendants to amend their answer. It would have been

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of no benefit to the defendants if they had been permitted to amend in the manner they asked for. A general averment that the "term of credit" had not expired would have been insufficient, as it would be but a mere conclusion of law, unsupported by any fact averred. It would have been necessary to have averred the date of the sale of the goods, and the length of time for payment given, and from these specific facts the Court could have determined whether the time had expired or not. But no amendment of that kind was asked for. In pleadings, statements of mere conclusions of law are insufficient; the facts from which the conclusion is drawn must be stated. Courts should be liberal in granting leave to amend pleadings, but when the proposed amendment is immaterial, a refusal to grant leave to amend cannot be urged as error.

The second ground of error is, that the denial of indebtedness in the answer was sufficient to put the plaintiffs to their proof. The denials are clearly insufficient to raise any issue upon any material fact. A general denial of the averments of the complaint, with the qualification of "except as hereinafter admitted," is clearly insufficient where the pleadings are verified. The denial in that form was not a specific denial, as required by the statute, and the averments were therefore properly deemed admitted. The denial of the alleged promise to pay was immaterial. Having admitted the indebtedness charged in the complaint, the law implies therefrom a promise to pay, and the denial of any express promise raised no issue that required any proof on the part of the plaintiff. As to the averments that the plaintiff was not the owner or real party in interest, they are not well pleaded, and the burden of proof was on the defendants, and as no proof was offered by the defendants to sustain them, it is not necessary, therefore, to notice them.

The judgment is affirmed.

WILKINS v. STIDGER.

A COMPLAINT which avers substantially that the defendant was at a certain time indebted to the plaintiff in a certain sum for professional services rendered at

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the special instance and request of the defendant, is sufficient without stating in terms the value of the services or that the defendant promised to pay.

The promise to pay alleged in the common count in assumpsit, was a mere conclusion of law from the facts stated, and need not be averred under the new code, which requires only the facts to be stated.

In an action by the assignee of an account, unliquidated demand, or thing in action, not arising out of express contract, the assignor cannot be made competent as a witness for the plaintiff by giving the notice of intention to testify, provided for in Sec. 422 of the Practice Act as recently amended. The clause in the latter section which speaks of an assignor of a thing in action or contract, includes only such persons as were permitted to testify under the provisions of Sec. 4, and not those prohibited by it. The amendments to Sec. 422 do not in any way extend the right of examining an assignor.

A party to an action is not bound by, or held to admit as true, statements made by his witnesses during the trial of a cause, because he does not deny or contradict them at the time.

In order to affect a person by conversations or declarations made in his presence they must be made to him in such a manner as requires him to deny or, by his acquiescence, to admit them.

In an action by S. against a stage company to recover damages for injuries sustained by the upsetting of a coach, the physician of S. was called by him as a witness to prove the value of his professional services as an element of damages. In a subsequent action brought by the physician against S., to recover for his services, the plaintiff offered proof of what he himself had testified as to their value upon the former trial, in connection with the fact that plaintiff was present and heard the evidence and made no objection to its correctness: *held*, that the evidence was inadmissible; that S. was not estopped from denying the truth of the evidence by having used it upon the former trial, for the reason that plaintiff had not been thereby influenced to do any act to his injury, and that S. was not bound by it, as an admission, for the reason that under the circumstances he was not called upon to admit or deny its truth.

Admissions of fact by counsel in one action, whether made during the hearing of the evidence or upon the argument, are not admissible in evidence against the client in another action.

The doctrine of acquiescence does not apply to proceedings on trials of controversies, because it is not the right or duty of a party to interrupt the order of proceedings in such cases by denials or contradictions, and his silence cannot, therefore, under such circumstances, be deemed an admission.

APPEAL from the Fourteenth Judicial District.

The facts appear in the opinion.

John Garber, for Appellant.

I. The complaint is fatally defective in not stating the value of the services or any promise by the defendant to pay. This defect

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is one of substance, and not cured by verdict and judgment. (*Chandler v. Rossiter*, 10 Wend. 487; *Hall v. Southmayd*, 15 Barb. 32.)

II. The Court erred in admitting evidence of what McDaniel testified before the arbitrators in the case of *Stidger v. Stage Co.* The statements of a witness in one action do not bind the party in another. He does not, by failing to object to the correctness of the statements of his witness during a judicial investigation, acquiesce in them or admit their truth, for the reason that he is not in such a time and place called upon to either admit or deny them. The authorities are uniform upon this point. (*Sutherland v. McGlaughlin*, 1 Carr & Marsh, 429; 3 Phil. Ev. 362, C. & H. Notes, Part 1; *Id.* note 329, p. 404, and cases cited; *Hovey v. Hovey*, 9 Mass. 216; *Martin v. Root*, 17 Id. 222; *Melen v. Andrews*, 22 E. C. L. 540; 1 Mood. & Walk. 336; *Tompkins v. Ashley*, *Id.* 32; *Fairleur v. Hastings*, 10 Ves. 123; *Toulmins v. Copeland*, 3 You. & C. 625; *Abercrombie v. Allen*, 29 Ala. 281.)

III. It was error to admit in evidence the statements made by defendant's counsel on the former trial, in which he was plaintiff. Statements of counsel do not bind the client outside of the particular action in which they are made. (*Brainard v. Buck*, 25 Vt., 2 Deane, 573; *McKeen v. Gammon*, 33 Me. 187; *Crockett v. Morrison*, 10 Miss. 3; *Hart's appeal*, 8 Barr. 37; *Curtis v. Hodge*, 21 How. U. S. 397; *Church v. Shelton*, 2 Curt. 274; 1 Green. Ev. Sec. 241; *Young v. Wright*, 1 Camp. 140; 2 Stark. 239; 3 Watts, 317; *Harrison v. Baker*, 5 Litt. 250; *Elting v. Scott*, 2 Johns. 157; 3 Green. Ev. Sec. 274, *et seq.* and cases cited *supra.*)

IV. The Court erred in allowing McDaniel to testify as a witness. He was the assignor of an unliquidated demand, and expressly prohibited from being a witness by Sec. 4 of the Practice Act. The amendments to Sec. 422 were not passed until after this action was instituted, and did not, therefore, apply to it. Besides, the provisions of that section, as amended, do not embrace an assignor of the character mentioned in Sec. 4. (See Broom's *Legal Maxims*, 68, margin 28; *Grimes' Estate v. Norris*, 6 Cal. 622.)

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J. O. Goodwin and Thomas P. Hawley, for Respondent.

I. The complaint is sufficient under our code of practice. (*Allen v. Patterson*, 7 N. Y. Appeals, 476; *Emery v. Fell*, 2 Kern. and cases cited.)

II. McDaniel was a competent witness.

Sec. 422, as amended, provides for the examination of the assignor of a thing in action, and notice was given as there required. The plain object of the amendment was to permit all interested persons to testify. It would be a strange interpretation to hold that, while the party himself may testify, the assignor, who had been previously excluded simply from a fear that he might be the actual party in interest, is still incompetent.

III. The statements made on the trial between defendant and the Stage Company, by the witnesses for the then plaintiff, as to the correctness of the physician's bill, were made in the presence of defendant, and acquiesced in by him, and were by his counsel insisted upon as the truth. Proof of those statements with the circumstances under which they were made, was proper in this action.

The admissions, declarations, or statements, made by defendant or any person authorized to act for him, relative to the subject matter of the suit, is admissible in evidence against defendant, though made in another suit, or between different parties. (*Battus v. Sellen*, 5 Har. & John. 398; *Shafter v. Richards*, 14 Cal. 126; *Whitney v. Buckman*, 13 Id. 539; 3 Phil. Ev. 356, note 220, 221; *Loyd v. Evans*, 3 Carr & Payne, 219; *Reed v. Rocap*, 4 Halst. 346, 352; 11 Stark. Ev. Part 1, 26; see also *Perry v. Sickles*, 13 Cal. 429; 2 Green. Ev. Sec. 126; *Toland v. Sprague*, 12 Pet. U. S. 333, 334; *Lockwood v. Thorne*, 1 Kern. 173, and cases therein cited.)

CROCKER, J. delivered the opinion of the Court—COPE, C. J. concurring, and NORTON, J. concurring specially.

This action was commenced by one McDaniel against the defendant to recover a demand for services as a surgeon and physician. The complaint avers that the plaintiff, McDaniel, is a physician and surgeon, and was employed by the defendant to perform services

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for him as such, which he did at the special instance and request of the defendant, and the nature of the services performed are then described; that for such services defendant is justly indebted to him in the sum of \$2,855 over and above all payments; that plaintiff has demanded payment from the defendant, but he has refused to pay the same. The complaint also avers, that defendant is indebted upon a promissory note, which is set out. When the case was called for trial, on motion of the counsel for the plaintiff, the name of Wilkins, the assignee of McDaniel, was substituted as plaintiff. The plaintiff recovered judgment; defendant moved for a new trial, which was denied, and he appeals.

The first error assigned is that the complaint does not state facts sufficient to constitute a cause of action, because that portion of the complaint which sets forth the claim for professional services does not aver any promise to pay, or that the services were of any value. We think the complaint is in this respect sufficient. It follows substantially the form of a count in debt, under the old system of pleadings. By transposing the averments, it can then be read in this way: that the defendant was at a certain time indebted to the plaintiff in a certain sum for professional services rendered by plaintiff at the special instance and request of the defendant. The promise to pay, alleged in the common counts in assumpsit, was a mere conclusion of law from the facts stated, and as the new code only requires the facts to be stated, they are sufficient without setting forth the conclusions of law arising from those facts. But, even if the complaint was in this respect defective, it is too late to make the objection after verdict. It should be made by demurrer. (*Osgood v. Davis*, 5 Cal. 453; *Sutter v. Cox*, 6 Id. 415; *Garcia v. Satrustegui*, 4 Id. 244.)

At the trial the plaintiff, Wilkins, introduced McDaniel as a witness, under notice given as prescribed by the amendment of 1861 to Sec. 422 of the Practice Act, to which defendant objected; and this is also assigned as error. The demand sued for was unliquidated and in the nature of an account. The witness was the assignor thereof, and was introduced on behalf of the plaintiff. Sec. 4 of the Practice Act expressly prohibits such an assignor from being a witness. We find nothing in Sec. 422, as amended,

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which alters or repeals this express and positive prohibition. Sec. 4 does not prohibit all assignors of contracts from being examined as witnesses. It was held by this Court, in *Oliver v. Walsh* (6 Cal. 456), that the terms "thing in action not arising out of contract," were to be construed to mean not arising out of *express* contract. Following that construction, assignors of things in action arising out of express contracts, not being mere accounts, or unliquidated demands, may be witnesses on behalf of the plaintiff under Sec. 4. And where the said amendment of Sec. 422 refers to an "assignor in a thing in action or contract," it must be held to include only such persons as were permitted to testify under the provisions of Sec. 4, and not to include those prohibited by it from being so examined. The terms used by Sec. 422 were evidently not intended to enlarge the right of examining assignors beyond what was then allowed by law, but simply to provide, that when such an assignor as could rightfully be examined was made a witness, then the adverse party might offer himself as a witness to the same matter in his own behalf. A careful examination of this section will show that the right of examining an assignor is not extended beyond what was then permitted by law. The Court therefore erred in permitting this witness to testify.

It seems that the professional services sued for were given in attending to injuries sustained by the defendant, caused by the upsetting of a stage coach of the California Stage Company, in which the defendant was a passenger. The defendant's claim for damages against the stage company was referred to arbitrators, and at the trial before them the defendant introduced McDaniel, to prove the amount and correctness of his bill for services, being the same in controversy in this suit, as an item of the damages to which he was entitled against the stage company. The plaintiff in this action offered evidence to prove this fact, of the use of McDaniel and his bill as testimony by the defendant, and it was admitted under the exception of the defendant. To support this ruling of the Court it is urged that as McDaniel testified that his bill was correct, and as the defendant was present and did not deny the statement, but used the evidence and bill in the trial before the arbitrators, as a true and correct account, it is evidence of an

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admission by him, and that his silence is to be deemed an acquiescence. It is clear that this evidence is not of such a character as to conclude the defendant, or to estop him from controverting it, for the plaintiff was not influenced thereby to do any act to his injury. His remaining silent, and not denying or contradicting his witnesses, when giving this evidence before the arbitrators, cannot be held as estopping him, or deemed an acquiescence. His remaining silent did not injure the plaintiff, or operate as a fraud upon him. It is clear that a party to a suit is not bound by, or held to admit as true, every statement made by his witnesses during the trial of a cause, because he does not deny or contradict them at the time. A denial or contradiction under such circumstances would produce great confusion, and cause continual wrangling between the party and the witnesses. There is a certain regularity, order, and decorum required in such proceedings, which precludes parties from interposing with denials and objections as they could in common conversations. There are circumstances under which statements may be made, which if not denied by the party at the time, he is deemed to have admitted, but this does not properly come within that rule. In *Hovey v. Hovey* (9 Mass. 216), the defendant had taken and filed the deposition of a witness in a previous action, and it was offered as evidence against him, on the ground that placing it on file amounted to an admission of the truth of the facts stated in it. But the Court held that there was no principle of law which authorized the admission of this kind of evidence. So it was held that a case, or agreed statement of facts, made between the assurers and assured, in an action on a policy of insurance, would not be received in another action in which the parties were different, though it related to the same subject or policy. (*Etting v. Scott*, 2 Johns. 156.) Two were charged with a felony, and it was proposed to prove that at the examination before the committing magistrate, one of them stated that the felony was committed by them jointly, and that the other was present, and did not deny it: *held*, inadmissible. (*Rex v. Appleby*, 3 Stark. 33.) So a deposition was taken in another suit, in the presence of the plaintiff, who had an opportunity of cross-examining: *held*, inadmissible, and that from his silence, or not cross-examining, it could not be inferred that he

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admitted the truth of the evidence given. (*Melen v. Andrews*, 1 Moody & Malkin, 336.) In order to affect a person by conversations or declarations made in his presence, they must be made to him in such a manner as requires him to deny, or by his acquiescence to admit them. In a controversy between B and C, conversations between them, relative to a tract claimed by A, in the presence of A, are not evidence against him, because they were not held with him. To hold a party to have acquiesced by silence, a declaration or proposition must be made to him, which he is either bound to deny or admit. (*Moore v. Smith*, 17 S. & R. 388; see also *Abercrombie v. Allen*, 29 Ala. 281; *Toulmin v. Copland*, 3 Young & Collyer, 625.) This evidence was, therefore, improperly admitted.

Proof was also admitted that during the trial before the arbitrators, and in the presence of the defendant, his attorney admitted the correctness of the bill, and insisted on its being included for the full amount in the award of damages against the stage company, and that the defendant did not deny it or contradict his attorney. The plaintiff also insists that this is evidence of an admission by the defendant, and that his silence at the time is to be deemed an acquiescence on his part. Much that we have said on the preceding point will apply equally to this. The same reasons which show that he was not concluded or estopped in that case apply here, and the same reasons also why his silence should not be deemed an acquiescence. Whether these admissions of the attorney as to the correctness of the bill were made during the hearing of the evidence or upon his argument, does not appear, nor do we conceive that it can make a great deal of difference. Admissions of facts by counsel in one suit are not to prejudice the party against whom they are made in another. (*Harrison's Devises v. Baker*, 5 Littell, 250; *Etting v. Scott*, 2 Johns. 156.) Admissions must in all cases be brought home to the party in the suit against whom they are used, or to some person who is identified in interest with him. (1 Phillips' Evidence, C. H. & E.'s Notes, 479, 480.) It is clear that admissions made by an attorney during the trial of a cause bind the party *in that action*; that is, they are to be taken as true for all the purposes of that action. So admissions made by an agent while mak-

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ing an agreement or proceeding within the scope of his authority as agent, bind the principal, and are admissible in evidence against him as part of the *res gestæ*. But this rule has no application to this case.

The respondent refers us to several cases, where it was held that if an account be sent to a debtor, and he do not object to it within a reasonable time, his acquiescence will be taken as an admission that the amount is truly stated. (*Terry v. Sickles*, 13 Cal. 427, and other cases.) This rule is undoubtedly correct, because the circumstances are such that the debtor can and ought to deny it, if it is not true; but, as we have already shown, this doctrine of acquiescence does not apply to proceedings on trials of controversies, because it is not the right or duty of a party to interrupt the order of proceedings in such cases by denials or contradictions, and his silence cannot therefore, under such circumstances, be deemed an admission. The Court therefore erred in admitting the evidence.

Judgment reversed and cause remanded for further proceedings.

NORTON, J.—Inasmuch as Sec. 422 of the Civil Practice Act, as amended in 1861, allows a party to an action to be examined as a witness in his own behalf, the reason for the provision in Sec. 4 that the assignor of an unliquidated demand shall not be a witness (which obviously was to prevent a party holding such a demand, which could not be proved except by his own testimony, from assigning it for the purpose of becoming a witness to prove it) no longer exists, and it may be imagined that it was designed to embrace such an assignor in the provisions of Sec. 422, as amended. But the language is not sufficient to effect such a purpose. An assignor is not a party to the action or a person for whose benefit the action is prosecuted, and hence is not within the letter of the section. The provision that when an assignor is examined, etc., is not equivalent to a provision that every assignor may be examined. The prohibition of Sec. 4, therefore, remains unaffected, and the admission of McDaniel as a witness for his assignee was an error. For this reason I agree that the judgment should be reversed and a new trial ordered. Upon the other points of the case I express no opinion.

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A COMPLAINT which states the facts of the case in ordinary and concise language is not demurrable, because such statement shows that the plaintiff is entitled to recover upon two different legal grounds.

Where a certificate of deposit is indorsed by the payee, payable to the order of a third person, the indorsement of the latter may be required by the makers before payment.

Certificates of deposit stand, as respects the rights and liabilities of indorsers, upon the same footing as bills of exchange and promissory notes.

A subsequent indorser of a certificate of deposit undertakes that he possesses a clear title to the certificate, deduced from and through all the antecedent indorsers, and by his indorsement agrees to clothe the holder under him with all the rights which legally attach to genuine indorsements against himself and all the antecedent indorsers.

A judgment will not be reversed on account of the admissions of improper evidence which is mere surplusage and immaterial to the issues.

When the makers of a certificate of deposit pay the amount to an indorsee who guarantees the genuineness of the payee's indorsement, and subsequently the payee, upon proof that his indorsement was forged, recovers from the makers the amount of the certificate with costs, the makers in an action by them against the subsequent indorsee and guarantor may recover the costs paid by them in the former action.

A verified complaint, which in stating a special demand essential to the cause of action, contains only the general averment that "defendants though often requested have refused," etc., is sufficient in this respect unless demurred to for want of certainty. If not demurred to, the defective averment is cured by verdict and judgment, and the objections cannot be raised for the first time in the Appellate Court.

APPEAL from the Sixth Judicial District.

The facts are stated in the opinion.

J. H. Gass, for Appellants.

I. The complaint is defective, and does not state facts sufficient to constitute a cause of action. The respondents' right to recover must depend on one or two hypotheses, either that the money was paid to appellants by mistake, or that it was paid to them as guarantors of the genuineness of the indorsement of the payee.

At common law, the first would require a different form of action from the second, and a mistake in determining the particular form of action would have been fatal to a recovery. Although our prac-

tice requires but "one form of action," it has not dispensed with the necessity of alleging such facts as would under one of the common law forms of action be necessary to entitle respondents to recover. For instance, if the money was paid by mistake, it would be necessary to allege that fact, as the gravamen of the action, to entitle the plaintiffs to recover. Whereas, if the money was paid upon the guaranty of the defendants, the question of mistake could not enter into the issue in determining the plaintiffs' right to recover, but they would be required to allege that they pursued all the necessary steps to charge them as guarantors.

II. If defendants are to be held to all the responsibilities of guarantors, the law entitles them to all the corresponding privileges incident thereto, and one of these is the right to demand and notice. This has been too often held by this Court to be an imperative prerequisite to a suit against a guarantor, to require argument here. (*Riggs v. Waldo*, 2 Cal. 487; *Price v. Kennedy*, 5 Id. 139; *Geiger v. Clark*, 18 Id. 580; *Reeves v. Howe*, 16 Id. 153.)

It was the duty of plaintiffs, the moment they discovered the forgery, to give Wells, Fargo & Co., the defendants, notice of the fact, that they might be enabled to adopt the necessary means for their own security, and unless this was done, they have no right of recovery against Wells, Fargo & Co. But not only were they required to give immediate notice of the forgery, but after having paid the money to Cox, it was incumbent upon them to make a demand on defendants for the money, before suit brought. They had no right to subject defendants to the expense and trouble of a suit, when *non constat*, that if demand had been made defendants would have paid the amount. Nor would this rule as to demand be changed, if plaintiff had brought his suit for money had and received; for the whole theory of that form of action is that the money has been received as the money of the plaintiffs, and is held in trust for his use and benefit.

III. There was no evidence to show that A. M. Hayden was authorized to bind defendants by giving a guaranty or indorsement, or that such was within his power as an agent of defendants, nor was there any evidence to show that defendants were guarantors of the genuineness of Joseph Cox's signature on the certificate of

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deposit, or of repayment, etc., or that they intended to bind themselves as such.

IV. The evidence shows that the defendants received the money from Mills & Co., as agents of Daniel Clark, and not for themselves; and that such fact was known to Mills & Co. at the time the money was paid by them to defendants. The defendants are therefore clearly not liable, and the plaintiffs have their remedy, if any, against Clark. (7 Cowen, 460; 14 Geo. 890; 3 How. 247, 349; 4 Taunton, 199; 2 Cowper, 655, 656.)

V. The Court committed error in admitting in evidence against defendants the judgment roll in the case of *Cox v. Mills & Co.*, the defendants not being parties thereto.

The rule is this: "that in a collateral undertaking by way of guaranty, when a suit is necessary to fix the liability of the guarantor, the first judgment is *prima facie* evidence of the default. But where the guarantor is liable without suit against the principal, the judgment against him is regarded as strictly matter *inter alios*." (*Fletcher et al. v. Jackson et al.*, 23 Ver. 592; 2 Ohio, 334.)

Apply this rule to the case at bar. Did Wells, Fargo & Co.'s liability to Mills & Co., admitting they are liable, depend on this judgment against Mills & Co., or upon a judgment against any one? Could not Mills & Co., if entitled to recover, have done so after having paid the money to Cox, by proving the forgery and the payment? This will not, I presume, be disputed; no such question has ever been raised in any of the cases where such recovery has been had. If Mills & Co. chose to submit to a suit, it was for their own protection, but not necessary to give them a right of recovery against Wells, Fargo & Co.

If this judgment could be conclusive, or even *prima facie* evidence against Wells, Fargo & Co., it would necessarily limit their defense to the question of the forgery of Cox's indorsement; for that was the only point litigated or which could be litigated in that suit. The pleadings admitted of no other issue; and it will scarcely be contended that it would have been proper to have tried in that suit the questions involved in this. To make that judgment evidence against Wells, Fargo & Co. in this suit, would be to cut off their whole defense as against Mills & Co. (See *Pico v. Webster*, 14 Cal. 202, and cases cited.)

VI. The Court below erred in entering judgment against defendants for the whole amount recovered from Mills & Co., by Joseph Cox, including costs of that suit and interest.

If that suit was not necessary to determine the liability of Wells, Fargo & Co. to Mills & Co., and if Wells, Fargo & Co. could not properly have defended in that suit, then they are not bound for the costs. It may be, that portions of those costs were improperly incurred, or wrongfully taxed, and still Wells, Fargo & Co. are precluded from inquiring into the same. If Mills & Co. are entitled to recover they can only recover the \$2,000 paid, with legal interest from the time of notice of the forgery and demand for the money.

J. W. Winans, for Respondents.

I. The complaint is sufficient. It complies *ex industria* with the statute which requires it to give "a statement of the facts constituting the cause of action in ordinary and concise language," by stating all the facts of the case upon which recovery (on any hypothesis whatever) could be predicated. It tells the entire story, and no one will deny that if the facts themselves justify recovery, the recital of those facts must be sufficient to sustain the pleading.

II. The evidence was voluminous and conflicting, and the findings of the jury on matters of fact will not therefore be reviewed.

III. There was no error in admitting in evidence against the defendants the judgment roll in the case of *Cox v. Mills & Co.* Taking plaintiffs' own rule, established by the case of *Fletcher v. Jackson* (23 Ver. 592), as the criterion, the evidence was clearly admissible. The rule merely claims that where a suit is necessary to bind the principal before the guarantor can be held liable, the first judgment is admissible, but where the guarantor is primary liable without suit against the principal, the first judgment is not admissible. But, the introduction of this judgment roll was not necessary, and is immaterial, for the only facts it could establish, viz.: the forgery and the judgment, were both admitted in the pleadings. Indeed, appellants concede in their brief, that "the question of the forgery of Cox's indorsement was the only point litigated, or which could be litigated in that suit," and further

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acknowledges that the judgment therein was introduced by respondents to establish the forgery in this action. The judgment roll therefore in that suit, even if inadmissible in this, was innocuous when admitted, mere surplusage of evidence, and therefore its admission cannot justify a reversal of the judgment in this cause.

IV. There was no error in entering judgment for the whole amount recovered from Mills & Co. by Joseph Cox, including costs. (*Edwards v. Lowe*, 8 Barn. & Cres. 407, 15 English Com. Law, 250, where the indemnity was only implied, and not, as here, express; *Scott v. McLellan*, 2 Greenl. 199; *Birt v. Kershaw*, 2 East. 457; *Lawler v. Shaw*, 5 Mason, 241; *Ilderton v. Atkinson*, 7th Term, 480.)

V. If the certificate had not been indorsed by appellants, and no contract of guaranty or indemnity had been made by them, yet as they obtained the money from respondents upon an instrument to which they had no title, they are compellable to refund.

"When a bill is assignable only by indorsement," says Chitty in his Treatise on Bills (page 260), "as no interest can be conveyed otherwise than by that act, and as it is a general rule that no title can be obtained through a forgery, any person getting possession of it by a forged indorsement will not acquire any interest in it although he was not aware of the forgery." And again (page 428), "where bankers discounted for the defendants a bill which they did not indorse, and it turned out that the names of the drawer and acceptor were forged, it was held that the bankers might recover the amount from the defendants, although it appeared they were bill-brokers and acted only as agents, and had paid over the amount, because they delivered the instrument to plaintiffs as a bill, whereas it turned out not to be a bill." (*Fuller v. Smith, Ry. & Moody*, 49; *Jones v. Ryde*, 1 Marsh, 157; *Bruce v. Bruce*, Id. 165.) The case of *Canal Bank v. Bank of Albany* (1 Hill, N. Y. 287) by the extraordinary closeness of its analogy to the case at bar, completely settles every material question involved in this appeal.

VI. A certificate of deposit, in its legal character and construction, is analogous to a promissory note. (*Bank of Orleans v. Merrill*, 2 Hill, 295; *Ellis v. Mason*, 1 English Jurist, 380;

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Edwards on Bills, 348.) And the indorsement of appellants, by procuration (through their authorized agent, Hayden), was intended to be, and became a warranty of the genuineness of the signature of Cox, and an indemnity against loss by reason of any defect therein. It was in effect a contract to refund the money to respondents, if that signature proved to be a forgery.

The rule is thus stated in Story on Promissory Notes, Sec. 380: "It is true that every indorser of a note, like the indorser of a bill of exchange, does by his indorsement impliedly admit the signatures of the antecedent indorsers to be genuine. But this proceeds upon the intelligible ground that every indorser undertakes that he possesses a clear title to the note deduced from and through all the antecedent indorsers, and that he means to clothe the holder under him with all the rights which by law attach to a regular and genuine indorsement against himself and all the antecedent indorsers. It is on this confidence that the holder takes the note, without further explanation, and if each party is equally innocent, and one must suffer, it should be he who misled the confidence of the other, and by his acts held out to the holder that all the indorsements are genuine." (*Oliver v. Andry*, 7 Louisiana, 496.) "The last indorsement of a note or bill is a guarantee of all preceding indorsements; it admits the handwriting of the drawer and all prior indorsers. The last indorser is consequently liable although the preceding indorsements were forgeries." (*Harris v. Bradley*, 7 Yerger, 310.) "There is a warranty implied in the transfer of every negotiable instrument, that it is not forged." (*Herrick v. Whitney*, 15 Johns. 240.) A bank is entitled to recover against the second indorser of a note discounted by the bank, although the indorsement of the name of the payee is a forgery, and although the note was offered for discount by the maker and not by the second indorser. (*State Bank v. Fear- ing*, 16 Pick. 533.) "The objection seems to be that Foote was responsible upon the implied warranty of the genuineness of the cheque and of his own title to it, which it has been repeatedly held accompanies the transfer of all negotiable paper." (*Murray v. Judah*, 6 Cowen, 491; *Smith v. Chester*, 1 Term, 654; *Lambert v. Pack*, 1 Salk. 127.

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CROCKER, J. delivered the opinion of the Court—COPE, C. J. and NORTON, J. concurring.

In the year 1859, Joseph Cox, deposited with the plaintiffs, who are bankers, in the City of Sacramento, the sum of \$2,000, for which they issued to him a certificate of deposit, in the usual form. Afterwards, in 1861, the certificate was presented for payment at their banking house, indorsed as follows:

“Pay to the order of Daniel Clark.

“JOSEPH (his X mark) COX.

“Pay to the order of Wells, Fargo & Co.

“DANIEL CLARK.

“Indorsement of Daniel Clark is correct.

“W. F. & CO.—ELDRIDGE.”

It was duly paid upon presentation, to the agent of Wells, Fargo & Co., the defendants. Immediately after the payment, it was noticed that the indorsement of Wells, Fargo & Co. did not certify to the genuineness of the signature of Cox, and one of the plaintiffs proceeded with the certificate to the office of the defendants, and there found one Hayden, an agent of defendants, from whom they demanded a repayment of the money, or a guarantee of the genuineness of Cox's signature. Hayden thereupon wrote upon the back of the certificate, “For Wells, Fargo & Co.—Hayden,” and handed it back, saying, “That makes it all right,” and he then returned with it. It seems that the certificate had been lost by or stolen from Cox, and that his pretended signature was a forgery. After the payment of the certificate to Wells, Fargo & Co., Cox sued the plaintiffs to recover the amount of the certificate, and they gave immediate notice thereof to Wells, Fargo & Co., and endeavored, unsuccessfully, to make them parties to the action, the motion to that effect being opposed by the defendants. Cox recovered judgment in that suit against the plaintiffs on the first day of November, 1861, for \$2,125 53, which they paid. They then demanded of the defendants the repayment of the amount thus paid by them, which was refused, and the plaintiffs then brought this action to recover the same. At the trial the jury found the following special verdict:

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1st. Did the defendants receive from plaintiffs, on delivery of the certificate of deposit in evidence in this case, the sum of \$2,000? Answer—Yes.

2d. Did the defendants receive said sum as principals, or as agents for Daniel Clark? Answer—As agents for Daniel Clark.

3d. Did D. O. Mills & Co. know at the time the money was paid to the defendants that the defendants were only acting as agents? Answer—No.

4th. Did the defendants, in the course of business, pay the money collected by them to said Daniel Clark? Answer—Yes.

5th. Did the plaintiffs have notice at or before they paid the said \$2,000 to defendants that the indorsement of Cox on the certificate was a forgery? Answer—No.

6th. Had the plaintiffs notice before such payment that Cox had lost said certificate? Answer—No.

7th. How much money did plaintiffs pay to Cox in the suit of *Joseph Cox v. D. O. Mills & Co.*? Answer—\$2,125 53.

8th. Did the defendants, by their agent, Hayden, guarantee the genuineness of the signature of Joseph Cox? Answer—Yes.

9th. Did defendants, by indorsement, contract with plaintiffs to indemnify them against loss by reason of the want of indorsement of Joseph Cox? Answer—Yes.

10th. Were the plaintiffs guilty of any negligence in paying the money, on presentation of the certificate, without verifying the signature of Joseph Cox? Answer—No.

Judgment was rendered on this verdict in favor of plaintiffs, from which defendants appeal.

The first error assigned is that the complaint does not state facts sufficient to constitute a cause of action. In support of this it is argued that the right to recover depends upon two grounds, either that the money was paid by mistake, or that the defendants are liable as guarantors of the genuineness of the indorsement of the payee, and that the facts upon which these different claims of recovery are founded are all stated in one complaint. We do not deem these valid grounds of objection. It was only necessary for the plaintiffs to state the facts of their case in ordinary and concise language, and if such facts showed that they had a right of action

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against the defendants, it is clearly sufficient, even though it also showed that they had a right to recover upon two different legal grounds. It may be that the plaintiffs paid the money to the defendants by mistake, and also hold them liable as indorsers or guarantors. Either would constitute a good cause of action, and it does not make their complaint insufficient because they have two good grounds of recovery instead of one.

The next point urged is that there was no evidence to show that Hayden was authorized to bind the defendants by giving a guarantee or indorsement, and that the special findings of the jury upon that point are not sustained by the evidence. It is not denied that there was some evidence to support these findings, and in such cases, when the evidence is conflicting, this Court will not disturb the verdict, especially when it is sustained by the Court below, on motion for new trial, as in this case.

It is also contended that there was no evidence to show that the defendants were guarantors or indorsers of the genuineness of Cox's signature. The certificate was indorsed by Clark, payable to the order of Wells, Fargo & Co., and the plaintiffs were not bound to pay it until indorsed by them. (*Canal Bank v. Bank of Albany*, 1 Hill, 287.) Their indorsement by Hayden was found to have been made by their authorized agent, and, therefore, binding upon them by the special verdict. By this indorsement the defendants, in contemplation of law, undertook that they possessed a clear title to the certificate deduced from and through all the antecedent indorsers, and they agreed thereby to clothe the holder under them with all the rights which legally attach to genuine indorsements against themselves and all the antecedent indorsers. As such indorsers, they cannot complain if called upon to repay the money which they have received upon their indorsement of a title which turns out to be void on account of the forgery of the antecedent indorsement, for there is a total failure of the consideration on which the transfer was made. (Story on Prom. Notes, Sec. 380 and note.) The law upon this point seems to be well settled, as applicable to bills of exchange and promissory notes, and certificates of deposit stand in these respects upon the same footing as promissory notes. (*Welton v. Adams*, 4 Cal. 30; *McMillan v.*

Richards, 9 Id. 418 ; *Coye v. Palmer*, 16 Id. 159.) This objection, therefore, is not a valid one. The law relating to guarantees has no bearing upon the present case. The fact that the special verdict refers to the liability of the defendants as being a guarantee, does not bring the case within the rules of law relating to guarantees. The evident meaning is, that the defendants, by their agent, Hayden, undertook and agreed that the signature of Cox was genuine. Such is clearly the rule of law applicable to cases of this kind. The case of the *Canal Bank v. The Bank of Albany* (1 Hill, 287) is very similar to the present, and many of the points insisted on by the appellants were passed upon and ruled against them by that Court. The opinion delivered by Justice Cowen in that case is a masterly exposition of the law upon the subject. (See, also, *Dick v. Leverich*, 11 Louis. 576 ; *Talbot v. Bank of Rochester*, 1 Hill, 295 ; *Hartsman v. Henshaw*, 11 How. 183 ; *Harris v. Bradley*, 7 Yerg. 310 ; *Olivier v. Andy*, 7 Louis. 496 ; *Herrick v. Whiting*, 15 Johns. 240 ; *State Bank v. Fearing*, 16 Pick. 533.) If the jury had used the word "warranty" instead of guaranty, it would have more clearly expressed their meaning, but the difference in the terms used is not sufficient to avoid the effect of the verdict.

It is also objected that the third finding of the special verdict is contrary to the evidence. It is not contended that there was any direct proof that the plaintiffs knew at the time the money was paid to the defendants that they were only acting as agents, but it is urged that it is fairly to be inferred from the evidence. It was for the jury to determine this matter, and we see no good reason for setting aside their finding upon this point, or upon the question whether the plaintiffs were guilty of negligence in paying the money.

The next error assigned is the admission in evidence of the judgment roll in the case of *Cox v. Miller & Co.*, the defendants not being parties thereto. We do not see how the defendants were prejudiced in any way by the admission of this evidence. It is true they were not parties to that action, but the plaintiffs endeavored to make them parties, and they had full notice of the suit, but refused to become parties to it. The plaintiffs in their complaint

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averred that such a suit was commenced, prosecuted, and a judgment rendered therein, and it was certainly admissible to prove those allegations, whatever its effect may have been, by way of concluding the defendants, or estopping them from denying the truth of the issues found and determined in that action. If this judgment roll was not necessary to make out the plaintiffs' case, its admission was merely surplusage, and could not injure the defendants. If it was necessary, then they have no right to have it excluded. It was not necessary to introduce it to prove that Cox's signature was a forgery, for that fact was not in issue, it being averred in the complaint and not properly denied by the answer, the pleadings being sworn to.

It is also assigned for error, that the costs paid by plaintiffs in the case of *Cox v. Mills & Co.* were included in the judgment. It seems to have been held that in actions like these against the indorser of a note or bill, the indorser is liable for such costs (*Scott v. McLellan*, 2 Green. 199; *Hubbly v. Brown*, 16 John. 70; *Jones v. Brooke*, 4 Taunt. 464; *Birt v. Kershaw*, 2 East. 458; *Edmunds v. Lowe*, 8 Barn. & Cress. 467), and we therefore overrule that objection.

The last objection of the appellants is that a demand is necessary in this case to hold the defendants liable, that no special demand is averred in the complaint, and none proved on the trial. It is doubtful whether a special demand was necessary in this case; but if necessary, the objection is not valid. The complaint avers that soon after the suit of Cox was instituted, they notified the defendants of the action, and moved the Court to make them parties, of which motion they were duly notified, and they appeared and opposed the same. After setting forth the facts relating to the liability of the defendants, and stating the amount, the complaint avers—"which, although requested, they have hitherto and still do refuse to pay." These averments are not denied by the answer, and no objection was made to the sufficiency of the averments in the complaint by demurrer, answer, or otherwise, either before or at the trial, or at any time in the Court below. Nor was a want of demand set up as a defense; but it is now, in this Court, for the first time, insisted that the averment of demand is insufficient,

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because it does not state when or by whom made. There is no doubt that in pleadings in common law actions, whenever a special demand was necessary, that it was required to be stated in that mode, and that the general averment of "although often requested" was not sufficient, but such pleadings were not required to be sworn to. In the present case there is a specific averment in the complaint, duly sworn to, that the defendants were requested, and refused to pay the amount claimed; and this fact, not being denied, is admitted by the answer. The objection is that the averment is not sufficiently certain, because it does not state the particular circumstances of time and the parties to the demand. We think that objection can only be raised by demurrer, for want of certainty, that any such defective averment is cured by the verdict and judgment, and the objection cannot be raised in this Court for the first time. Had it been pointed out in the Court below, it could have been cured by amendment.

Judgment affirmed.

HARPER v. RICHARDSON *et al.*

A PERSON through whose land a road has been projected, in accordance with the provisions of the road law of 1861, and who presents his claim for damage to the road viewers, must thenceforward pursue the remedy pointed out by that statute, by either accepting the award of the viewers, agreeing with the Board of Supervisors, or commencing within the time limited an action against the county. By neglecting to follow the statutory remedy, he waives his claims and is barred from bringing any action for damages.

Road viewers, under the Act of 1861, located a road through the land of plaintiff, who presented a claim for damages in the sum of three hundred dollars. The viewers awarded him no damages, and he took no steps to agree with the Board of Supervisors or to sue the county, but several months afterwards, the Supervisors having established the road as a highway and ordered the owners to open the same, he commenced the present action against the latter to enjoin his proceeding: *held*, that the action could not be maintained—that plaintiff having become a party to the proceeding, now limited to the statutory remedy, and that by his failure to sue the county within the time prescribed, he had waived all claims for damage. The provisions of the road law of 1861, prescribing the mode for obtaining compensation by parties through whose land a road is located, are constitutional.

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APPEAL from the Seventh Judicial District.

The facts are stated in the opinion. The action was commenced December 21st, 1862.

Swan & Hays, for Appellants.

I. The complaint does not show sufficient facts to justify a Court of Equity to interpose by injunction, or to give such Court jurisdiction—because the plaintiff had a plain, speedy, and adequate remedy at law, and if so, a Court of Equity has no power to interpose. (*Dewitt v. Hays*, 2 Cal. 469; *Burnett v. Whitesides*, 13 Id. 157.)

II. The complaint shows that the plaintiff had notice of the application for the road and that he filed his claims for damages before the Board of Supervisors, and was properly a party to the proceedings. Although there was no award made by the viewers as to the damages sustained by the plaintiff, yet, being a party to the proceedings, and properly before the Board, he had all the rights to bring his action that he would have had, had the viewers made an award as to his damages under the provisions of said act; under the same section he had the right to agree with the Board of Supervisors as to the damages.

III. The complaint does not show that any action against the county has ever been brought by the plaintiff, as is provided for in the Act of 1861, and by his failure to bring such action he has dedicated the land over which the road passes, to public use.

M. A. Wheeler, for Respondent, cited *McCann v. Sierra Co.* (7 Cal. 121) and *McCauley v. Weller* (12 Id. 530.)

CROCKER, J. delivered the opinion of the Court—COPE, C. J. and NORTON, J. concurring.

The complaint in this case, which is duly verified, avers that the plaintiff is the owner of a tract of land; that a petition was duly presented to the Board of Supervisors of the county where the land is situated, praying for the opening of a road on a route across his land; that viewers were duly appointed to assess the damages done to private property by such location; that he remonstrated against

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the proceedings, and filed his claim for damages in the sum of three hundred dollars; that on the thirteenth day of June, 1862, the viewers reported, recommending the opening of the road, but awarded no damages to the plaintiff on his claim; that on the fourth day of August, 1862, the Board of Supervisors ordered the road to be opened; that he has never waived his right to compensation, and never received any, and no provision has been made for paying him; and that, unless restrained, the road overseer, Richardson, will proceed and open the said road across his land, and concludes with a prayer for an injunction. A temporary injunction was granted. The answer admits the material facts stated in the complaint, and avers that the viewers duly assessed and reported all the damages sustained by private individuals by reason of the location of the road, and that on the fourth day of August, 1862, the Board of Supervisors proceeded to consider all matters touching the original petition and all subsequent proceedings thereon, in connection with the report of the viewers, and the evidence introduced by interested parties, and duly confirmed the report of the viewers, established the road as a public highway, and allowed all the damages sustained by individuals by reason of the location of the road; that the road is of great value to the plaintiff, and has enhanced the value of his land, by affording him the means of access thereto; and avers that the plaintiff's action is barred, and he has dedicated the land to public use, by failing to bring his action within the ten days prescribed by the Act of 1861 respecting roads. The defendants moved to dissolve the temporary injunction, which was refused, and the defendants take this appeal from the order refusing to dissolve the injunction.

The Road Law of 1861 (Stat. of 1861, 389) provides that, "If any person or persons, claiming damages on account of the location or alteration of any road under the provisions of this act, shall be dissatisfied with the award of the road viewers, and cannot agree with the Board of Supervisors as to the amount of damages sustained, and shall refuse to receive the same, such person or persons shall, within ten days from the time of final hearing, commence an action against the county, by name, for such damages, in a Court of competent jurisdiction, which action shall be conducted

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in like manner as other actions in civil cases in the Courts of Justice of this State, except as hereinafter provided." Sec. 10 of the same act provides that "if any person over whose land such road shall pass shall fail to present his claim for damages to the Board of Supervisors, or to file his or her complaint in the proper Court as prescribed in this act, within the time prescribed, said person shall be deemed to have dedicated the land over which such road shall pass, to public use; and such person shall be forever barred from bringing or maintaining any action or proceeding for damages therefor, and the road shall be opened according to the provisions of this act."

The plaintiff in this case was a party to the proceedings for the location of the road before the Board of Supervisors. He filed his claim for damages, and if the viewers failed to award him what he was entitled to, either by not finding him entitled to any damages, or by awarding him an insufficient amount, he could have brought the matter before the Board for their determination either before or at the time of their final action upon the report of the viewers. Whether he thus appeared or not is not stated; but, as he was a party to the proceedings, it was his duty thus to act, if he was dissatisfied with the award of the viewers. Then, if he could not agree with the Board as to the amount of damages, he was entitled to bring his action against the county, if brought within ten days from the time of final hearing. He has not done so; and we think it clear that he is thereby barred from bringing this action, or any action, for damages. His failure to bring his action for damages within the time limited by the statute, is a waiver of his claim therefor. It may be that he is benefited more than he is injured by the location of the proposed road, and in such case it would be proper for him to waive his claim, but he is to be the judge on that point. The statute affords him the proper remedy in case he is injured by the award, properly limits the time within which he must commence his suit to enforce that remedy, and clearly points out and declares what the effect shall be in case he fails to comply with its provisions. There is no pretense that the act is unconstitutional.

The order refusing to dissolve the injunction is reversed, and the injunction is dissolved.

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KIDD v. TEEPLE.

A MORTGAGE of real estate does not, in this State, confer the right to the possession of the mortgaged property, except as the result of a foreclosure and sale.

By an instrument in writing, a ditch company "granted, bargained, and sold" a water ditch "and also the entire proceeds derived from said ditch, from the sale of water, and also the proceeds from the sales of water" from another ditch, called the Virginia Ditch; and in the same connection the grantees were authorized "to collect, demand, and receive the rents, issues, and profits, and the entire proceeds" of said ditches, or sufficient thereof to meet the payments thereafter mentioned. Then followed the usual proviso in a mortgage, that if the several installments of a certain debt, due the grantees, were duly paid, the conveyance should be void—and a further clause, that in default of payment the grantees might sell the "premises before described with all the appurtenances" in the manner prescribed by law: *held*, that the instrument was, as to all the property mentioned in it, simply a mortgage, and that nothing in the provisions respecting the profits and proceeds of sales of water authorized the mortgagees to take possession of either ditch before a foreclosure and sale.

After a sale of mortgaged premises on execution against the mortgagor, and a delivery of the Sheriff's deed to the purchaser, the mortgagee can acquire no right of entry by a permission from the mortgagor who has remained in possession.

A judgment will not be reversed on account of error in admitting improper evidence upon a point immaterial to the decision.

When a judgment is correct by the record, it will be affirmed without reference to the grounds upon which it was rendered by the Court below.

The respondent may insist, in the appellate Court, upon a point properly presented, although it was not urged in a trial Court.

APPEAL from the Fourteenth Judicial District.

This was an action of ejectment, brought by G. W. Kidd against D. C. Teeple and others, to recover a water ditch, known as "Omega Water Ditch," in Nevada County. The complaint alleged title and right of possession in plaintiff, at and prior to May 29th, 1861, and an entry and ouster by defendants on that day. The answer admits the possession of the defendants, and, after a qualified denial of plaintiff's title, avers that in October, 1858, the Omega Water Ditch Company were the owners of the ditch described in the complaint, and at that time executed an instrument in writing to defendants under which they subsequently

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received the possession from the Omega Water Ditch Company, and by the terms of which, they were entitled to take and to still retain the possession. The answer set forth the terms and provisions of this instrument substantially conforming to those of the mortgage described below. The plaintiff demurred to the new matter set up in the answer on the ground that the instrument described did not warrant defendants in taking or holding possession. The record does not show what disposition was made of this demurrer. The replication denied that the ditch mentioned in the mortgage instrument, described in the answer, was the same as that described in the complaint.

It appeared in proof, that defendants were in October, 1858, the owners of a ditch called the Diamond Creek Ditch, leading from Diamond Creek to Omega, and having the prior right to the waters of that creek; that the "Omega Water Ditch Company" were at the same time the owners of a ditch called the "Virginia Ditch," constructed in 1856 to bring to Omega the waters of the same creek, and also with a view to an extension beyond to the South Yuba River, of which the creek was a tributary; that at the date mentioned, the Omega Water Ditch Company purchased of defendants the Diamond Creek Ditch, and agreed to pay them \$12,000 therefor in installments, and to secure the payment executed the instrument referred to in defendants' answer. This instrument commences in the usual form of a mortgage conveyance, and grants, bargains, and sells to the defendants "all and singular that certain water ditch and premises known as the Diamond Creek Water Ditch . . . also the entire proceeds derived from said ditch, from the sale of water, and also the proceeds of the sale of water from the property or ditch heretofore known as the Virginia Ditch in the township, county, and State aforesaid, and the said party of the first part does hereby authorize the said parties of the second part or their assigns to collect, demand, and receive the rents, issues, and profits, and the entire proceeds of said ditch or ditches, arising or accruing from the sale of water flowing therein, or sufficient thereof to meet the several payments of money as hereinafter mentioned—to have and to hold the above mentioned and described premises to the said parties of the second part, their heirs," etc.

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Then follows a proviso in the usual form, that upon payment of the several installments of the debt when due the conveyance shall be void, but that in case default be made, "then the said parties of the second part, their heirs, etc., are hereby authorized and empowered to sell the premises before described with all and singular the appurtenances in the manner and form prescribed by law."

The plaintiff acquired the title of the Omega Water Ditch Company by purchase at judicial sale, receiving the Sheriff's deed March 21st, 1860. In September, 1860, the Omega Company, having still retained possession, and having made default in their payments to defendants, delivered to them the possession of the ditches professedly in compliance with their agreement in the mortgage of October, 1858. After the making of this mortgage and before the purchase of plaintiff, the Omega Company completed the extension of the Virginia Ditch to the Yuba River, diverting into it the waters of that stream as well as those of Diamond Creek, and the whole ditch was then called the "Omega Water Ditch." The evidence on the trial was principally directed to the question of identity between the "Virginia Ditch," mentioned in the mortgage, and the "Omega Water Ditch," the plaintiff contending that the mortgage covered nothing more than the original ditch and the waters diverted by it from Diamond Creek. On this point, one Hawley, who had been employed by defendants as an attorney to draw the mortgage, was permitted to testify as to declarations made at the time by defendants, going to show their understanding, that the mortgage only embraced the ditch then completed, defendants objecting both on the ground that the declarations were privileged, and also that they were inadmissible to explain the writing. The record does not show that the Court below considered or passed upon the question of the right of defendants to the possession of whatever premises were covered by the mortgage. That Court having found as a fact, that the "Omega Water Ditch" sued for was not embraced in the description in the mortgage, gave judgment for the plaintiff, and the defendants have appealed.

Tod Robinson, for Appellants.

I. The communications to Hawley were privileged, being made

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to him in the character of attorney. (*Turquand v. Knight*, 2 M. & W. 101; 1 Phil. Ev., 3d Ed. 163; 1 Greenl. Ev. Secs. 240, 241; *Comstock v. Heathcote*, 2 Br. & B. 4; *Rex v. Duke of Beddington*, 8 Duval Ry. 726; *Parker v. Carter*, 4. Manf. 273; 5 Cal. 450.)

II. The evidence given by Hawley was, in effect, proof of declaration of intentions of a party to a deed for the purpose of identifying the property described in it. Such evidence is not admissible. (2 Phil. Ev. Ch. 7, Secs. 1, 2.)

McConnel & Garber, for Respondents.

The testimony of Hawley was immaterial, because, admitting the identity of the ditch in controversy with the Virginia Ditch, we are still entitled to recover, for the reason that the appellants show no right to the possession under the mortgage.

The mortgage does not include the "Virginia Ditch." The Diamond Creek Ditch alone is mortgaged, to secure the money due upon its purchase. The same words of grant, which are applied to the Diamond Creek Ditch are there applied to its rents, issues, and profits, and to the rents, issues, and profits of the Virginia Ditch.

The difference between the mortgage of the ditch, and that of the proceeds, rents, etc., consists in the power to "collect, demand, and receive" the latter, whereas there is no power to enter upon the former and take possession, or use it.

By the terms of this power or authority, the mortgagees are doubtless entitled to possession of the rents, issues, and proceeds; but of neither of the ditches, and especially not of the Virginia Ditch. The error of appellants, consists in confounding the rents, issues, and profits, with the ditches themselves. The parties themselves committed no such error, else why authorize the mortgagees to collect, demand, and receive the rents? etc. These are the words of the common power to collect debts. A party cannot collect, demand, or receive from himself, nor can rent or profits be due from a man to himself.

Had the parties intended to give possession, they would have given a power of entry, and expressly provided that possession

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should pass. All this unseemly and unmeaning jargon about demanding and collecting rents, issues, and profits, would have been omitted, and they would have made a Welch mortgage of it at once.

The parties, by giving a power of entry, and by express covenant, could have transferred the possession; but there is no such power or covenant here. Hence, the right to the possession can only follow as an incident to some other right. But possession, when it is incident, and not independent, can only be incident to an estate, and the question at once arises, to what estate in the Virginia Ditch is the alleged right of possession incident?

A mortgage in this State is only a security; it passes no estate whatever, and gives neither *jus ad rem*, nor *jus in re*. In adopting this view of a mortgage, our Courts and Legislature have merely adopted the more refined and rational notions of the operation of redeemable securities for a long time prevalent in Courts of Law and Equity. (See *Eaton v. Jacques*, Douglass, 445, note 1; *Rew v. Bulkeley*, Id. 292; Coate on Mortgages, 175; Practice Act, Sec. 260.)

The property mortgage consists of two parts: 1st, The Diamond Creek Ditch; 2d, The rents, issues, etc., of the Diamond Creek Ditch, and also of the Virginia Ditch.

It will be readily admitted, that the mortgage of the Diamond Creek Ditch does not pass an estate in it. But if a mortgage of the ditch itself carries no estate, how can it be said that a mortgage of the rents and profits accruing from it, can pass an estate? It is true that, as we have already shown, the rents and profits are legally different from the ditch itself; but still, they are incidents to it; they flow out of it, and cannot exist independent of it. The title to them may be, and often is, separate and independent of the title to the principal thing, but they themselves must always exist as incidents.

It is an universal principle, that the grant of an incident cannot pass the principal, and at all events, that it cannot pass a larger estate than a grant of the principal itself. But the mortgage of the Diamond Creek Ditch passed no estate in the ditch itself, *a fortiori*, the mortgage of the rents, etc., passed no estate in the ditch.

If this reasoning be sound when applied to the Diamond Creek

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Ditch, it is still more conclusive when applied to the Virginia Ditch. The Virginia Ditch is not at all affected by the mortgage. The Diamond Creek Ditch is in terms pledged for the payment of the money; but the parties seem, by omitting all mention of the Virginia Ditch, to have, *ex industria*, excluded the idea that the latter was subject to the charge.

Rent is a "compensation or return yielded periodically to a certain person out of the profits of corporeal hereditaments by the tenant in possession." (2 Black. Com., Sec. 41; 2 Kent's Com., Sec. 469; 2 Stephens' Com. 23.)

So the term "issues" is more frequently used to denote something due from a party in possession to a party out of possession, than otherwise.

All the terms used, in fact, are such as clearly indicate an intention that the mortgagees were merely to receive the rents, etc., of the property from the persons in possession, whoever they might be. Nor is there anything anomalous in the position, that one party should have a right to the possession, and another, to the rents and profits. It is the common case of landlord and tenant. Our own law presents an example precisely in point.

Appellant, in reply.

The respondent has raised a question in this Court which was not presented in the Court below, and which cannot or should not be presented here. This is an Appellate Court, and its duty is confined to the review of the action of inferior tribunals, and the correcting their erroneous decisions on matters which had before been presented to them.

From an examination of the answer and replication, it is apparent that the only matters of inquiry were, whether the ditch property in dispute was embraced in appellant's mortgage, and whether they entered into the possession of such property in pursuance of the mortgage? It is obvious, too, from the opinion of the Judge below, that no other matter was called to his attention, and that the judgment was rendered for respondent wholly upon the ground that the property described in the mortgage was not the same described in the complaint.

The point now relied on was, as appears from the transcript, raised by a demurrer on the part of the respondent. But as nothing appears to have been done with the demurrer, it is presumed to have been waived.

As a demurrer was the only proper way to raise this question upon the facts set forth in the answer, and as the respondent either abandoned it, or did not raise it in a practical form, according to the rules of proceedings in a Court of Justice, it is confidently apprehended that the point, deemed of no importance in the preparation of the case, or on the trial, or which it was supposed or understood could not be sustained by the facts, cannot now be resorted to before this tribunal to sustain the judgment of the Court below upon the only points and issues which were submitted on the trial.

II. If, as it is admitted, the conveyance of the entire rents, issues, and profits forever of an estate, is the conveyance of the estate in fee, why would not a conveyance of the rents, issues, and profits, for the payment of a debt until the debt was paid, be a mortgage of the estate? If, then, this was a mortgage of the ditch, and the possession was given by the mortgage, the defendants cannot be trespassers as to mortgage, or those who claim under him.

Unless this is a mortgage on the ditch with a right of the possession thereof, it is no mortgage of anything whatever, and no security for a debt in any form. To enable the mortgagor to have a lien or mortgage on the rents, issues, and profits, it is necessary he should have possession of the thing from which the rents, issues, and profits proceed. Otherwise, the rents, issues, etc., must go into the hands of the mortgagor, and consequently to his personal responsibility alone can the mortgagee look.

The mortgage becomes no security whatever. To deny that the appellants intended to obtain some other than the personal security of their debtor, is to deny the record.

NORTON, J. delivered the opinion of the Court—COPE, C. J. and CROCKER, J. concurring.

By operation of Sec. 260 of the Civil Practice Act, and it may be said also of some other sections of that act, and certain sections

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of the act concerning conveyances (Secs. 1, 24, 36-40) and of several decisions of this Court (*McMillan v. Richards*, 9 Cal. 365; *Johnson v. Sherman*, 15 Id. 287; *Fogarty v. Sawyer*, 17 Id. 589), a mortgage of real estate does not in this State confer the right to the possession of the mortgaged property, except as the result of a foreclosure and sale. The defendants' mortgage has not been foreclosed. The mortgage has no special provision authorizing possession to be taken, whatever might be the effect of such a special provision. It is in the usual form. It conveys the property, but provides that if certain payments are made, then the instrument is to be void; but if default be made in their payment, then the property may be sold. These provisions apply to the proceeds of the sale of water of the Virginia Ditch, as well as to the body and proceeds of the sale of water of the Diamond Ditch. Until default and a consequent foreclosure and sale, the defendants had no right to enter upon, or take possession of the premises, and having done so, they are liable to be ejected the same as any other intruder.

By the findings of the Court below it appears that the defendants took possession of the mortgaged premises by permission of the mortgagor, the Omega Ditch Company. But this was in the month of September, 1860, and by the same findings it appears that the plaintiff received the Sheriff's deed, which constituted his title, on the twenty-first day of March, 1860. Therefore, at the time the Omega Ditch Company gave the permission to take possession, the title to the property and the right to the possession was not in them, but in the plaintiff in this action. Hence, permission given by them at that time, conferred no right of entry upon the defendants.

Under these circumstances, if there was error in admitting the testimony of the witness Hawley, which is the main objection urged by the appellants, it was immaterial.

The objection that the respondents can only rely upon the point of the want of identity between the Omega Ditch and the Virginia Ditch, because that is the ground upon which the Court below based its conclusion of law, is not tenable. It does not appear that the conclusion of law was based alone upon that finding. The Court speaks of it as "one of the main questions in the case."

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Besides, however clear it might appear that the Court below considered that a controlling fact, yet if the respondents can show, or if this Court perceives, that on the findings the decree was correct, the judgment must be affirmed.

None of the errors assigned affect the findings which, as we have above specified, establish the plaintiff's right to recover in this action.

The judgment is therefore affirmed.

ASKEW v. EBBERTS *et al.*

An action cannot be maintained by the defendant in an execution to recover of the officer the penalty prescribed by Sec. 222 of the Practice Act for selling without proper notice, unless by a sale so made the complainant has been deprived of his property. If the attempted sale is a nullity and passes no title, no injury has been sustained, and no right of action for the forfeiture accrues.

No right of property vests in the purchaser at an execution sale until he pays the purchase money, and until this is done, the sale is not so far perfected as to constitute the foundation of an action to enforce a forfeiture for selling without the prescribed notice.

In an action to enforce a penalty or forfeiture imposed by statute the claim is to be strictly construed.

APPEAL from the Eleventh Judicial District.

The facts are stated in the opinion.

C. A. Tuttle, for Appellant, cited: (Practice Act, Secs. 21-23; *Harvey v. Flake*, 9 Cal. 93; *Kohler v. Hays*, 5 Id. 66; *Parks v. Freer*, 9 Id. 642; 6 Id. 50.)

Hereford & Williams, for Respondents, argued: 1st, that Sec. 222 did not apply to constables; and, 2d, that plaintiff had sustained no injury by the attempted sale, and therefore was not an aggrieved party to whom alone a right of action is given.

CROCKER, J. delivered the opinion of the Court—COPE, C. J. and NORTON, J. concurring.

Askew v. Ebberts.

This is an action upon a constable's bond, executed by the defendant Ebberts as principal, and the other defendants as sureties, to recover the sum of five hundred dollars, the penalty or forfeiture under Sec. 222 of the Practice Act. A judgment had been rendered against the appellant, an execution issued thereon which came to the hands of Ebberts, as constable, for service. He levied the execution upon a mining claim, advertised it for sale, and sold it to one Felton for twenty-five dollars. The purchaser did not pay the bid, nor was any certificate issued therefor. The constable, finding that the sale had not been advertised the length of time required by the statute, advertised it again for sale, giving the proper length of notice, and sold the property at such second sale for two hundred and six dollars. These facts appearing by the plaintiff's evidence, the defendants moved for a nonsuit, which was granted. Plaintiff moved for a new trial, which was refused, and he takes this appeal.

The action being to enforce a penalty or forfeiture, the claim is to be strictly construed, and the plaintiff must show clearly that his case comes within the statute imposing the forfeiture. The statute provides that "an officer selling without the notice prescribed by the last section shall forfeit five hundred dollars to the aggrieved party." The party is not injured or "aggrieved" unless it appears that by means of the sale, without notice, he has been deprived of his property. Unless the sale is perfected by a transfer of the title, the debtor has suffered no injury, and is not "aggrieved" within the intent and meaning of the statute. It is the fact that the party has been injured or damaged by the sale of his property by an officer without notice that entitles him to the forfeiture. By the sale complained of in this case, the plaintiff was not injured, as under it his property was not conveyed, or his interest therein divested or affected in any way. Besides, in this case there was no "sale" of the property under the defective notice. Nothing passed by the proceedings—no right in the property was vested in the purchaser until he paid the purchase money, and until then, the sale was not perfected or completed. The Sheriff, if the money was not paid immediately, could without delay resell the property. In this case the purchaser did not pay the purchase money, and

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the officer rightfully resold the property, after giving the proper notice. Under this statute the aggrieved party can only recover the forfeiture when the sale has been perfected and completed by, at least, the payment of the purchase money by the purchaser.

The judgment is affirmed.

HOADLEY v. CROW.

WHERE the transcript on appeal from an order denying a new trial contains no statement, settled or agreed upon, the order will be affirmed. An allegation embodied in the transcript, as an assignment of errors by the appellant that the first Judge omitted to settle a statement which was submitted to him, cannot be taken as a substitute for a statement, nor does it constitute any reason for reversing the judgment.

APPEAL from the Ninth Judicial District.

This is an appeal from an order overruling a motion for a new trial. The transcript on appeal contains the judgment roll, and what purports to be the evidence given on the trial, and certain exceptions, but there is no statement, either on appeal or on motion, for new trial, either settled or agreed to. At the close of the transcript is a paper purporting to be a statement of points and assignment of errors, signed by appellant's attorney, in which it is stated that a statement on motion for a new trial was preferred and served by him, and exceptions thereto filed by the respondent, and these papers submitted to the Judge for settlement, but that he had omitted to settle the same.

R. T. Sprague, for Appellant.

J. B. Harmon, for Respondent.

NORTON, J. delivered the opinion of the Court, COPE, C. J. and CROCKER, J. concurring.

This is an appeal from an order denying a motion for a new trial. The testimony of certain witnesses is copied into the record, but there is no statement of any kind. There is, therefore, nothing before us which we can consider for the purpose of judging of the

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propriety of the order appealed from. (*McIntyre v. Willis*, 20 Cal. 177.)

The allegation that the Judge omitted to settle a statement which was submitted to him cannot be taken as a substitute for the statement, nor does it constitute a reason for reversing the judgment. The necessary steps should have been taken to obtain a settlement of the statement.

Judgment affirmed.

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WHERE it has been shown in proper form to the Probate Court, that a sale of personal property of an estate is necessary to pay the debts, a statement in the order of sale that it is "perishable property and liable to assessment and taxation," may be treated as surplusage, and does not vitiate or affect the character of the order.

The validity of a sale of personal property made under an order of the Probate Court, cannot be attacked in a collateral action on the ground of an irregularity or defect in the order of sale, or proceedings under it. They can only be impeached by a direct action brought for that purpose.

Thus, in an action upon an indemnity against loss in a sale of stock by executors: *held*, that the defendants could not question the regularity of an order of sale made by the Probate Court, or of the sale made in pursuance thereof.

Where the defendant covenanted with executors, that if, in the course of administration of the estate, certain stock should be sold at public auction "upon reasonable notice," and should bring less than a certain amount, he (defendant) would pay the deficiency: *held*, that by the term "reasonable notice," was meant the general notice required in such sales by the Probate Act, and not any other or personal notice.

An action upon a written agreement to pay money upon demand, may be maintained without any previous actual demand.

In an agreement by defendant to indemnify the plaintiffs against loss upon a sale of stock, the former covenanted that if the proceeds of a sale were less than a certain amount, he would "make good the deficiency, *on demand*, after the said sale:" *held*, that an action for the deficiency might be maintained at any time after the sale, without a previous demand.

APPEAL from the Fourth Judicial District.

The plaintiffs were, in 1855, appointed executors of the estate of one Folsom, deceased, which estate, among a large amount of real and other personal property, included two hundred and fifty shares

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of stock in the Sacramento Valley Railroad Company. November 12, 1855, the executors applied for a sale of some of the property, and in their petition stated that "The personal property of the testator consisting in stocks, a particular enumeration, description, and valuation whereof will be found in Exhibit "B," under the head of stocks, they do not deem it advisable to sell before they communicate with the legatees and learn their wishes on the subject, especially as much of the stock is very low and has scarcely any market value." And in an exhibit annexed to this petition under the head of stocks, appears: "Sacramento Valley Railroad, amount paid in \$13,034 75." On the nineteenth day of February, A.D. 1857, the following agreement was entered into between the plaintiffs, as executors, and the defendant, J. Mora Moss:

"Articles of Agreement made and entered into this nineteenth day of February, 1857, by and between J. Mora Moss, party of the first part, and H. W. Halleck, A. C. Peachy, and P. W. Van Winkle, executors of the estate of J. L. Folsom, deceased, parties of the second part, Witnesseth, that whereas, the said estate and the said parties of the second part, in their capacity of executors as aforesaid, hold two hundred and fifty shares of the capital stock of the "Sacramento Valley Railroad Company," on which the said company has called for an unpaid assessment, amounting in the aggregate to the sum of seven thousand four hundred and thirty-three dollars and eighty-eight cents; and whereas, the said executors have declined to pay said assessment, except upon a guaranty to the effect hereinafter stated. Now, in consideration that the said executors have agreed to pay the said assessment, and for the further consideration of one dollar in hand paid to him by the said executors, the said Moss hereby covenants and agrees with the said Halleck, Peachy, and Van Winkle, executors as aforesaid, that if the said stock, in the course of the administration of said estate, shall be sold at auction, upon reasonable notice, the proceeds of said sale shall amount to as much as the assessment to be paid by said executors as aforesaid, together with an advance thereon of one per cent.; and if the proceeds of said sale shall be less than the sum aforesaid, including the said advance, then the said Moss will

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make good the deficiency to the said estate, on demand after the said sale.

"In testimony whereof the said J. Mora Moss has hereunto set his hand and seal, the day and year first above written.

"Signed. J. MORA MOSS. [L.S.]

"Witness, E. A. CASELLI."

Subsequently, one Donald Frazer, a creditor of the estate, filed a petition, praying that a portion of the real estate belonging thereto might be sold to satisfy his debt. The executors, March 7th, 1859, filed an answer to this petition, objecting to a sale of the real estate on the ground that there was still personal property unsold, and also in compliance with an order of the Court, a report, showing the then condition of the estate, and containing the following averment and petition:

"That on the twelfth day of November, 1855, they presented to this Court their petition, praying for an order authorizing them to sell certain portions of the said estate, setting forth its condition, the claims against it, etc., which said petition with exhibits annexed thereto, and made a part thereof, they pray may be held and considered as part of this report and petition. And the executors further represent, that the personal property of the estate comprised under the head of 'stock,' in said petition of twelfth November, A.D. 1855, ought to be sold, inasmuch as the same are liable to assessments, and most of them pay no dividends to the estate; and the executors pray the Court for an order authorizing them to make such sale."

Upon this petition, the stock mentioned in the agreement was sold. The notice of the hearing of the petition was as follows:

"Notice is hereby given, that H. W. Halleck, P. W. Van Winkle, and Archibald C. Peachy, having filed in this Court their report and account, as executors, with a petition for an order of sale of personal property of the estate of Joseph L. Folsom, deceased, the hearing of the same has been fixed by said Court, for Monday, the twenty-first day of March, 1859, at eleven o'clock in the forenoon of said day, of the March Term of 1859, at the court-room thereof, in the City Hall in the City and County of San

Francisco; and all persons interested in said estate are notified then and there, to appear and show cause, if any they have, why said petition should not be granted."

And the order of sale by Probate Judge, as follows:

"Application having been made to the Court by the executors of the estate of J. L. Folsom, deceased, for an order of sale of certain personal property of the estate hereinafter mentioned by the petition, in writing, of said executors, filed herein on the seventh day of March, 1859, setting forth the facts showing such sale to be necessary; which application was, by the order of this Court, on that day made and filed, set for hearing upon the twenty-first day of March last, upon which day the said executors appeared by their counsel, Gregory Yale, Esq., and certain of the creditors of the estate appeared and were represented by their counsel, Eugene Casserly, Esq.; and due proof having been there made, to the satisfaction of the Court and filed herein, that notice of said application had been given according to law, the hearing of the said application was regularly continued from that time to this day by orders of this Court duly entered of record. And now on this twenty-fifth day of April, 1859, at eleven o'clock, A.M., to which time said application was duly adjourned by the last of continuances, aforesaid, the said parties appearing by their counsel, aforesaid, and no objections or exceptions having been filed, and no opposition having been made, and the Court, from an examination of the said matter, being satisfied that a sale of said property is necessary, and that the articles are perishable property and liable to assessment and taxation, it is hereby ordered, that the said executors be authorized to sell at public auction to the highest bidder, for cash, the personal property of the estate undisposed of, comprised under the heads of "Library," "Pictures," "Table and Bed Linen," and "Stocks," as set forth in their petition filed in this Court November 12th, 1855."

Notice of the sale was given by posting in three public places, as required by the Probate Act, and also by publication in two newspapers.

The stock brought \$4,175, net \$4,049 75, selling at sixteen and a half and seventeen and a half cents, and leaving a deficiency, on

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the contract, of \$8,458 47, for which the present action is brought on the contract. The market value of the stock, at time of trial, was shown to be thirty cents, or \$7,500.

Bearing upon the question of notice to defendant, Moss, of the sale or notice to him of the deficiency and demand before suit brought, the only evidence is as follows :

“ One Waller testified—“Thinks defendant, Moss, was at salesroom of auctioneers before the sale. Afterwards carried a note to defendant from Billings; the defendant afterwards came into the office, and I saw him conversing with Halleck and Billings. Billings was the attorney of executors.”

Cross-examined—“Saw Moss at the salesroom on the morning of the day of the sale. I don't know whether he was there at the time of the sale of this stock.”

One Sinton testified: “Moss was present in the morning before the sale. I don't know whether he was present during the sale of this stock. Catalogues were distributed in salesroom; Moss asked me to purchase a certain book for him.”

Cross-examined—“I think it more than probable, that Moss asked me to purchase the book, because he, Moss, was going away and could not be present at the sale.”

Upon this evidence, the Court found, among other things, “that Moss was present at the sale and had personal notice thereof.” The plaintiff had judgment for the deficiency, with interest from the day of sale, from which defendant appeals.

Whitcomb, Pringle & Felton, for Appellants.

I. This was not a valid sale “in the course of the administration of the estate,” for it appears to have been sold as “perishable property,” but long after “the term of the Court, to which the inventory is returned.” That term is the only time, as the law then stood, at which sales of property, as “perishable” property, could be made. (See Wood's Digest, 406, Sec. 150.) The order of the Probate Judge recites “that the articles are perishable property, and liable to assessment and taxation.” And the petition on which the sale is founded, says that the stock “ought to be sold, inasmuch as the same are liable to assessment and most of them

pay no dividends to the estate." We claim, therefore, that the sale was not a valid sale, and we insist that in order to recover against us, or our guaranty, they must show a valid sale, "in the course of the administration of the estate," before they can come upon us for a deficiency.

But more than this, we are entitled under the guaranty to a sale, under the circumstances and of the character contemplated by the parties to the contract. In the first place, it is clearly not within the spirit of the bargain to sell the property under pretense of its liability to the very danger we had, by the consideration of our guaranty, effectually provided against. The assessment, the payment of which we procured to be made, was the final assessment, and left the stock "full paid;" not liable to further calls. For after the amounts subscribed are all paid in, stock is not liable to forfeiture. (See Wood's Digest, 595, Sec. 13.) If by the inducements of our guaranty, we save the stock from all danger of perishing by assessment, and agree to pay any deficiency that may arise upon "a sale in the course of the administration of the estate," certainly "a sale in the course of the administration," means something else than a sale to avoid assessments. Whatever that expression may mean, it certainly cannot mean that very thing which both parties to the contract distinctly excluded from their minds by providing against.

We submit that it is clear, both from the nature of the contract and from the terms used, that the contracting parties meant to exclude, as a motive for sale, that "liability to assessment" or perishability upon which the sale was afterwards based, and that the guarantor is released from his guaranty.

"If there be any condition in the terms of the guaranty precedent to the liability of the guarantor, it must be strictly complied with or the guarantor will be discharged." (Story on Cont. 871.)

We insist that the words "in the course of the administration of the estate," were meant to designate a sale "necessary to pay demands against the estate." The words of the contract, "in the course of the administration," seem to have been used *ex industria*, in contrast with the threatened sale under pressure of assessment, to describe a deferred sale that might afterwards become necessary

from the wants of the estate." And to make the guarantor liable there must appear affirmatively to have been present demands against the estate, and, that the sale was ordered upon that ground, not any pretense of perishability, not any debts possible, future, or contingent, but only such debts or demands as made a sale then necessary, and a sale actually ordered upon the ground of necessity.

The respondents seek to avoid this argument by insisting that it sufficiently appears from the proceedings, that there were debts against the estate, and that the sale was properly conducted, to meet the requirements of the statute for payment of debts. But the character of the sale is determined by the application and the order. Neither petition or order speak of a necessity for payment of debts, but only of a necessity arising from perishability.

II. The next ground of error relied on by the appellants is, the finding of fact that Moss was present at the sale and had personal notice thereof.

The evidence does not show any notice, whatever, to Moss, and it proves him not to have been at the sale. But if he was there before the sale and staid to the sale, it does not appear to have been in consequence of any previous, much less of any "reasonable notice." And his mere presence at the sale, would not have been a waiver of the want of notice. An appearance or personal presence, can only operate as a waiver of notice, where the only object of the notice is to procure the presence of a party. When a man has done or is doing what he is required to do, he waives objection. But where the notice is for some other thing than his appearance or personal presence, how can he be said to waive that other thing by his presence?

It will hardly be contended that the statutory notice by posting and publication, is the "reasonable notice" required by the contract. The words "upon reasonable notice," must mean "reasonable notice" to Moss, or they mean nothing at all. For a sale in the course of the administration of the estate, implies statutory notice. The addition of the words "reasonable notice," must mean something more than statutory notice. The party would naturally be anxious to add a condition of personal notice to the general con-

ditions of the law. The statutory notice was all-sufficient to secure a good attendance and bidders; but the statute would look out for his special contract, and so he adds the condition, "or reasonable notice," which are the every-day words of such contracts. They have grown to be the familiar and short form of expression used in contracts of pledging, and are invariably used with reference to notice to the pledgor or guarantor. As used in this contract, these words can mean only one of three things: the statutory notice, or notice to all the world, or notice to the guarantor. The statutory notice is a necessary incident to an administration sale, and would not be intended. Notice to all the world, would not be specially intended, for the law provides for that, as much as possible, in the statutory notice. Notice to the party, himself, is the clear and only intention—notice to him long enough before the sale to enable him to prepare for it.

III. The guarantor was entitled to notice of the deficiency of the principal fund, and of the amount of such deficiency. (*Chitty on Cont.* 733.)

IV. Plaintiffs should have made demand before suit brought for the amount ascertained to be due. The want of such a demand is fatal; for the subject matter of the contract and the contract itself require it. In ordinary cases of a money liability, as upon a promissory note or liquidated demand, no demand is necessary; the suit itself being sufficient demand. But, where the liability is collateral to some other person or thing, a demand before action brought is necessary to fix the liability, and especially where the contract required it. *Carter v. Ring* (3 Camp. 469) is a case directly in point. Lord Ellenborough holding that in debt, on bond conditioned for the payment of a sum of money on demand, the plaintiff must prove an express demand before suit brought. And *Chitty on Cont.* (734), after stating the common cases where no demand is necessary, says, "a different rule holds in the case of a bond with a penalty to secure the performance of a collateral act;" and in note *x*, "at all events, a surety is entitled to a demand where he engaged to pay on request." (*Sicklemore v. Thistleton*, 6 M. & Sel. 9; *Lilley v. Hewart*, 11 Price, 494.)

Gregory Yale, for Respondent.

CROCKER, J. delivered the opinion of the Court—NORTON, J. concurring.

This case has previously been before this Court, and will be found reported in 17 Cal. 339—and it was there held, that the plaintiffs had failed to offer sufficient proof to sustain the judgment, in this, that they had failed to show any order of Court directing notice of the sale of the shares of stock to be published in any newspaper, and there was no proof that the notices had been posted as required by law, in the absence of such order. The case went back for a new trial, which has been had, and judgment again rendered for the plaintiffs, from which the defendants again appeal.

The record shows that on the twelfth day of November, 1855, the plaintiffs, as executors of the estate of J. L. Folsom, deceased, filed their petition in the Probate Court, praying for an order authorizing them to sell the personal property of the deceased, including among a large number, the stocks mentioned in the agreement, which is the foundation of this action. One Donald Fraser, a creditor of the estate, filed a petition in the Probate Court, praying for an order for the sale of real estate belonging to the estate. The executors, in their answer to this petition, show that all the personal property of the estate had not been disposed of, averring that of the stocks inventorized a part only had been sold. On the seventh day of March, 1859, in compliance with an order made by the Court in the matter of the petition of Donald Fraser, the executors filed a report and petition, in which they aver that "the personal property of the estate, comprised under the head of 'stocks' in the petition of November 12th, 1855, ought to be sold, inasmuch as the same are liable to assessment, and most of them pay no dividends to the estate," and praying the Court for an order authorizing them to make such sale.

Notice of this application for an order to sell this property was duly given, and the hearing was fixed for the twenty-first day of March, 1859. All persons interested in the estate were notified to appear and show cause, if any they had, why said petition should not be granted. The matter was continued from time to time, but

no opposition was filed to the application, and on the twenty-fifth of April, 1859, the Court ordered that the executors be authorized to sell at public auction to the highest bidder, for cash, the personal property of the estate undisposed of, comprised under the heads of "stocks," etc., as set forth in their petition filed November 12th, 1855. The stock mentioned in the agreement was sold under and in pursuance of this order, on the eleventh day of May, 1859, notices of which, specifying the time and place of the sale, were posted up in three public places in the county. The stock sold for \$4,049 75, after deducting expenses, leaving a deficiency under the contract of \$3,458 47.

It is urged by appellants that this was not a valid sale "in the course of the administration of the estate," as required by the terms of their contract, because the order of sale recites "that the articles are perishable property, and liable to assessment and taxation," and because it does not appear that the sale was "necessary to pay any demands against the estate." This objection is not valid. The record sufficiently discloses the fact, that the petition for the sale and the order of sale were made under proceedings instituted by a creditor of the estate, to procure a sale of real estate for the payment of his debt. The answer of the executors to the petition of the creditor showed that all the personal property had not been sold, and under the statute (Wood's Digest, 406, Sec. 154) the real estate could not be sold until all the personal property had been duly disposed of. There was therefore a necessity for the sale of the personal property, and the executors properly filed their petition to obtain an order for its sale. The mere statement in the order that it was "perishable property, and liable to assessment and taxation," does not vitiate it. They are not necessary to the order, and are in truth mere surplusage.

Besides, these proceedings are not liable to be attacked in this collateral action. The Act of March 27th, 1858, (Statutes of 1858, 95) provides: "That the proceedings of the Courts of Probate, within the jurisdiction conferred on them by the laws, shall be construed in the same manner, and with like intendments, as the proceedings of Courts of general jurisdiction; and that the records, orders, judgments, and decrees of the said Probate Courts shall have

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accorded to them like force and effect, and legal presumptions, as the records, orders, judgments, and decrees of the District Courts." The proceedings in this case relating to this sale took place after the passage of this act, and are governed by it. If they were defective or irregular in any way, they could only be attacked by a direct action brought for that purpose, and cannot be impeached in any collateral suit. (*Irwin v. Scriber*, 18 Cal. 499.)

In the case of *Spriggs' Estate* (20 Cal. 121), it was held, that an order for the sale of real property of an intestate, made by the Probate Court, after notice to all the parties interested, in the manner required by the statute, and after the examination of the proofs presented, is an adjudication that the sale of the property described is necessary, and unless appealed from, is conclusive and binding upon the administrator and upon all parties interested in the estate. And the same point was reaffirmed in the case of *Haynes v. Meeks* (20 Cal. 288).

In this case the defendants could have appeared under the notice given to all parties interested, and if they had good grounds therefor, could have opposed the granting of the order for the sale of this stock. Not having done so, they cannot object to it in this proceeding.

The next objection is to the finding of fact that the defendant, Moss, was present at the sale, and had personal notice thereof, which, it is insisted, is not sustained by the evidence. The record discloses the following evidence upon this point: Waller, one of the witnesses, states that he thinks that defendant, Moss, was at the salesroom of the auctioneers before the sale; saw Moss at the salesroom on the morning of the day of the sale; don't know whether he was there at the time of the sale of this stock. Sinton, one of the auctioneers, states that Moss was present in the morning before the sale; don't know whether he was present during the sale of these stocks; catalogues were distributed in the salesroom; Moss asked me to purchase a certain book for him. This witness, also states, that one of the notices of the sale was posted up at the doors of their auction rooms. From this evidence, the Court below was justified in finding that the defendant, Moss, knew of the sale; and, whether he was present at the time of the sale of this par-

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ticular stock, we do not deem very material. If he knew of the sale he could have been present, had he deemed it important or necessary.

But it is urged, that direct personal notice to Moss was necessary under the contract. The portion of the agreement relied upon to sustain this point reads as follows: "The said Moss hereby covenants and agrees with the said Halleck, Peachy, and Van Winkle, executors as aforesaid, that if the said stock in the course of the administration of said estate shall be sold at auction, *upon reasonable notice*, the proceeds of said sale shall amount to as much as the assessment to be paid by the executors as aforesaid," etc. Appellant contends, that the "reasonable notice" mentioned in the contract, means "reasonable notice" to him personally, and not the general notice to all persons of the sale required by the statute. It is evident that the term "reasonable notice" is the general notice to be given to the public, who are by it requested to attend and bid at the sale. If it had been the intention of the parties that personal notice of the sale should be given to him, the defendant who executed the agreement should have so expressed it in plain terms. The instrument having been executed by him, it is his fault if there is any uncertainty in its expressions. He cannot complain if, in this respect, it is construed against him. But it is evident, as we have shown, that he knew of the sale, and if the proper notices had not been given, or he had any other objections to it, he could have appeared and presented them and enabled the executors to cure any defects, or obviate any valid objections. Nor did the defendant show, that he suffered any damage for want of notice. He offered no evidence to show that the stock sold for less than its market or its intrinsic value. It sold for sixteen and a-half and seventeen and a-half cents on the dollar of its nominal value. To be sure, one witness swore that at the time of the trial, September 5th, 1861, the market value was thirty cents on the dollar, but that was nearly two years and a-half after the sale, and forms, therefore, no proper criterion of its value at the date of the sale. The time required by the statute for the posting and publication of the notice is a legal determination of the meaning of the words "reasonable notice," when used in connection with sales of this character.

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The next and last point raised by the appellant is that no notice of the deficiency was ever given to him by the plaintiffs, and no demand ever made upon him by them for the payment of such deficiency. To support this, he claims that the contract sued on is in the nature of a guaranty, and that he is, substantially, a surety, and as such entitled to notice and demand before suit. We cannot see anything in the contract which gives him the rights of a guarantor or surety. We might inquire whose ability or liability to pay does he guarantee, or for whom is he surety? The contract is solely his own, and in it he agrees that certain stock sold in a certain manner shall amount to a certain sum; and then he agrees as follows: "and, if the proceeds of said sale shall be less than the sum aforesaid, including the said advance, then the said Moss will make good the said deficiency to the said estate, on demand after the said sale." The Court has found that the defendant had notice of the sale, and it would seem from this that he must have known of the deficiency, which he had agreed to pay. One of the witnesses states, that after the sale, he carried a note from Billings, the attorney of the executors, to the defendant, and that defendant afterwards came to the office, and he saw him conversing with Halleck and Billings, but this is entirely insufficient, in the absence of all proof of the contents of the note, or the subject of the conversation, to prove a notice or demand.

The rule is well settled that in an action upon a promissory note, payable on demand, it is not necessary to aver or prove an actual demand before bringing suit, the institution of the suit being a demand. (*Zeil v. Dukes*, 12 Cal. 479; *Story on Prom. Notes*, Sec. 29.) We see no good reason why the same rule should not be applied to other instruments for the payment of money, as well as to promissory notes, and it has been so applied in several cases. (*Gibbs v. Southam*, 5 Barn. & Adol. 911; *Husbands v. Vincent*, 5 Har. 268; *Baughan v. Graham*, 1 How. 220; *Wyman v. Fowler*, 3 McLean, 467.)

The case of *Dyer v. Rich* (1 Met. 180) was very similar to the present, and the Court held that no demand was necessary before suit. That was an action upon an agreement, by which the defendants agreed that one Blake should pay three certain promis-

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sory notes when due, and upon his neglect or refusal they would pay the full amount of the notes, with interest and costs; and, further, that the plaintiff should within two years receive certificates of ten shares of full paid stock in a certain company, and that within that time a certain amount of the capital stock of said company should be paid in by the other stockholders; and the agreement concludes as follows: "And that if, at the expiration of the said two years, the capital stock actually paid in, including the agreed value of said patent right, shall not be equal to the sum of five hundred dollars on each share then issued, we will forthwith *upon demand*, pay the said Dyer, his executors, administrators, and assigns, such further sum or sums of money as, in addition to those which shall have been paid in as aforesaid, shall amount to the sum of five hundred dollars on each of said shares." The Court says upon this point: "The stipulation on the part of the defendants was that, if within two years the plaintiff did not receive a transfer of ten such shares, they would pay the difference in cash, on demand. No demand of the shares, therefore, was requisite; and, as to the demand provided for in the agreement, it was to pay money on demand. And the *sæpe requisitus* contained in the writ, is all the demand necessary to be averred, and by a well-known and familiar rule of law, no other proof of that averment is required." The rule here laid down seems a just and proper one, and, as the present case comes within it, it should be governed by it.

The judgment is therefore affirmed.

DOLHEQUY v. TABOR.

PENDING an appeal to the Commissioner of the General Land Office, from the decision of a United States Land Register, in a contest between a person at whose request the State Locating Agent has made a selection in the United States Land Office, in conformity with the School Land Act of April 23d, 1858, and a person who, before the issuance of a certificate of purchase, had interposed before the Register a claim as preëmtor, the rights of the applicant for location are suspended and preserved, and until the final decision no other location of the same land can be made to his prejudice.

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In the case above stated, no payment of the twenty per cent. of the purchase money to the treasurer of the county need be made by the applicant until the appeal is determined, and the result known at the Register's office.

Where, pending the appeal in the above case, a third person, with full knowledge of its pendency and the rights of the first applicant, procures the issuance to himself of a certificate of purchase under the same act, he will be deemed to hold the certificate in trust for the former applicant in whose favor the appeal is decided, and may be compelled by bill in equity to transfer it to him upon being reimbursed his expenses.

APPEAL from the Thirteenth Judicial District.

The facts are stated in the opinion of the Court.

O. M. Brown, for Appellant.

Relief in equity may always be had, in cases of fraud, accident, or mistake, and the present is a proper case for relief, as the title complained of was procured through the positive fraud of Tabor, and the mistake of the State Agent. In the case of *Mott v. Hawthorn* (17 Cal. 59), the plaintiff showed that he had done nothing whatever to acquire the title which defendant had acquired; had not attempted to do so, had complied with no law, nor had he done all the law permitted in such cases. Had he shown the acts or diligence of appellant in the case at bar, I apprehend the decision of the Court would have been the reverse of what it was. Plaintiff's right to the certificate is clear. So long as that certificate is in the possession of another, he can neither maintain ejectment against, or successfully defend, an action brought on the certificate by the respondent, and the injunction and other equitable relief prayed for should have been awarded by the Chancellor. (1 Dev. Eq. 12.)

John Reynolds, for Respondent.

The appellant claims that this case differs from the case of *Mott v. Hawthorn* (17 Cal. 58) in this, that in this case the plaintiff tried to obtain the certificate of purchase, while Mott did not make so great efforts as plaintiff. The particular act of diligence tending to show his intention to pay his money and receive his certificate (in certain contingencies), and which he claims entitles him to relief in this action, is depositing an amount of money with the

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Register, to be paid to the Treasurer, on the appeal of Tabor (not defendants) being unsuccessful—and afterwards withdrawing it before the decision of the appeal. If the purchase could be made and completed by the payment of the money, pending the appeal, then the way was open to plaintiff to pay his money and take his certificate. But on the other hand, if the purchase could not be made and the certificate issue until the decision of the appeal, then the defendant's certificate was void, and the purchase attempted to be made by Fowler, his assignor, was in fact no purchase, and plaintiff might have paid his money and demanded his certificate, after the decision of the appeal—and if it was refused him, his remedy, if he has any in the Courts, would be by *mandamus*.

NORTON, J. delivered the opinion of the Court—COPE, C. J. and CROCKER, J. concurring.

On the twenty-ninth day of September, 1858, Dolhequy made a request to the locating agent to have the land in question located under the Act of April 23d, 1858. The selection was made in the United States Land Office on the fourth day of October, 1858. On the sixteenth day of November, 1858, one James C. Tabor made a claim at the United States Land Office to have a pre-emption right to a portion of the land. Upon a notice to the parties interested, this claim was investigated by the United States Register, and on the eleventh day of January, 1859, a decision was made against the claim, from which decision the claimant, on the twelfth day of January, 1859, appealed to the United States Commissioner of the General Land Office, and on the same day the United States Register transmitted a transcript of all the papers and proceedings and testimony in the case to the Commissioner, and notified Dolhequy that the approval of the location made by the State in his behalf, and all further proceedings in regard to said location were thereby suspended. Dolhequy thereupon deposited with the United States Register the sum of one hundred and twenty dollars, to be paid to the State for the first payment of twenty per cent. and interest, if his location should be finally allowed.

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The United States Commissioner of the General Land Office, on the tenth day of August, 1860, decided against the claim of James C. Tabor to a preëmption right, but before his decision was known to the Register here, Dolhequy, on the fifteenth day of August, 1860, withdrew his money from the hands of the Register. In the meantime—to wit, on the thirteenth day of July, 1860—one Fowler procured a location of the same land to be made in his behalf, and received a certificate of purchase for the same. This certificate has since been transferred to the defendant, John A. Tabor, who advanced the money by which the certificate was obtained, and who, it appears by the undenied allegations of the complaint and the proofs, had full knowledge of the proceedings taken by Dolhequy to procure a certificate of purchase, and of the suspension of those proceedings in consequence of the appeal taken by James C. Tabor from the decision on his preëmption claim, and for whose benefit it may clearly be inferred the certificate was procured in the name of Fowler. The decision of the Commissioner of the General Land Office was received by the Register in California on the thirteenth day of September, 1860, and Dolhequy on the sixth day of October, 1860, paid to the County Treasurer on his location, the sum of one hundred and seventy-nine dollars, being the amount of the twenty per cent. and three years' interest, and the Treasurer's fee.

The defendant claims that the plaintiff forfeited his right to a certificate of purchase by not paying for it in due time.

The Act of 1858 does not specify the time when payment is to be made, and the application to become a purchaser was not made by Fowler until long after the proceedings under Dolhequy's application had been suspended. Dolhequy's rights, we think, continued in force during the pending of the appeal by James C. Tabor, and until the result of that appeal was known at the United States Register's office. By Sec. 4 of the Act of 1859, supplementary to the Act of 1858, the twenty per cent. is to be deemed to be due and payable within fifty days after the approval of the Surveyor General is recorded by the locating agent. The approval of the Surveyor General does not appear to have been filed in the matter after the decision of the United States Commissioner of the

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General Land Office upon the appeal of James C. Tabor, but it could not have been filed until that decision was known here, and within fifty days of that time, and when the law of 1859 had taken effect, Dolhequy paid the twenty per cent. and interest to the County Treasurer. Under these circumstances, we think he has the prior and better right to the certificate of purchase. Nothing has occurred from the time he first made his application by which his rights under that application have become forfeited. The deposit he made with the Register was not necessary, and its withdrawal did not affect his right. The defendant, having taken his certificate with full knowledge of Dolhequy's rights, must be deemed to hold it in trust for him, and should be required to transfer it to him upon being reimbursed his expenses.

The judgment is therefore reversed and the Court below directed to enter a decree as prayed for in the complaint.

ADAMS v. KNOWLTON *et al.*

REAL ESTATE conveyed to the wife during coverture by a conveyance in the usual form of a deed of bargain and sale, is, *prima facie*, the common property of herself and husband. If the wife claims property thus conveyed to be her separate property, the burden of proof is on her to show the fact.

Community property is liable for the debts of the husband.

A declaration of a married woman, under the Sole Trader Act, must state: 1st, that she intends to carry on some certain business—specifically describing it; 2d, that she intends to carry on such business in her own name; and 3d, on her own account. These three facts are essential, and a declaration which omits either is fatally defective, and will not entitle the declarant to the privileges of a sole trader.

A declaration in the following form: "State of California, County of Nevada—H. Adams, resident of Nevada City, and wife of P. Adams, hereby declares that she intends to carry on the business of Restaurant and Hotel Keeping, accommodating boarders and lodgers, in the City of Nevada, and from this date will be individually responsible, in her own name, for all debts contracted by her on account of her said business; that the amount of money invested in said business does not exceed or equal five thousand dollars. (Signed) H. Adams," and sworn to and acknowledged, is insufficient, and will not sustain a claim of the declarant to hold, as a sole trader, property subsequently conveyed to her for the purposes of the business mentioned, as against an execution creditor of her husband.

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APPEAL from the Fourteenth Judicial District.

The facts are stated in the opinion.

McConnell & Garber, for Appellants.

The authorities all show that a statute giving privileges to a married woman, in derogation of common law, must be strictly construed. (*Selover v. American Co.*, 7 Cal. 270; *Barrett v. Tewksbury*, 9 Id. 15; *Rendall v. Miller*, Id. 592; *Lunning v. Brady*, 10 Id. 267; *Pease v. Barber*, Id. 440; *Burns v. Zachariah*, 11 Id. 291; *McMillan v. Reynolds*, Id. 378; *Morrison v. Wilson*, 13 Id. 497; *Molt v. Smith*, 16 Id. 556.)

In Pennsylvania, married women are, by the law of 1848, allowed to "hold what they acquire by trading, during coverture, on their own account."

Under this statute, all the cases hold that the wife must show, by clear and conclusive evidence, that she is within the specified exceptions. If a deed is made to her during coverture, reciting a consideration moving from herself, this does not even raise a presumption that it is her separate property. She must prove that she acquired it in the way specified, and that none of the purchase money came from her husband. (*Pettit v. Fritz*, 33 Penn. 120; *Mandubeck v. Meek*, 29 Id. 43; *Bradford's Appeal*, Id. 513; see also *Commonwealth v. Williams*, 7 Gray's Mass. 337; *Pixley v. Higgins*, 15 Cal. 121.)

The cases above cited show by the most irrefragible reasons that the utmost strictness must be applied in confining the party seeking the benefit of these statutes within the words and limits of the act itself. One of the Pennsylvania cases shows that a *femme sole* trader cannot alienate the property invested without the concurrence of her husband, and utterly repudiates the idea that the marital relation is dissolved, and a system of judicial concubinage substituted for it.

In our own State, the case of *Pixley v. Higgins* (15 Cal. 127) seems absolutely conclusive. The statute is silent as to property purchased by a sole trader. But our Supreme Court has decided that the right of the wife to acquire property, during the marriage,

by purchase, can only exist as an exception to the present rule as laid down in Sec. 2 (Wood's Digest, 487), and that this exception exists in the case of a "sole trader, under the statute;" that a sale of property so purchased, under execution against the husband, would be a cloud on the title, for she would have to show in ejectment, affirmatively, that she had complied with the conditions prescribed by the statute. (*Alverson v. Jones*, 10 Cal. 9; see also *Smith v. Smith*, 12 Id. 216; *Meyer v. Kinzer*, Id. 247.)

It has also been decided that when the property invested does not exceed \$5,000, it may come from the husband, unless, at the time, he is in embarrassed circumstances, when it is void as against his creditors. (*Guttman v. Scannell*, 7 Cal. 455.)

D. Belden and J. I. Caldwell, for Respondents.

The declaration, filed by plaintiff as a sole trader, omits the words: "Upon her own account and in her own name," but follows the statute in all other respects, and also contains the special declaration that "she will be responsible in her own name for all the debts and liabilities she contracts as sole trader." Statutes are not to be construed or expounded upon mere technical rules, unless such is the apparent intention of the Legislature. (14 Mass. 88; 1 Pick. 458; 4 Mass. 534.)

The Supreme Court of this State has said: "Literal conformity is not as a general rule required; a substantial compliance is all that is necessary. When the end is answered, the mere mode is not usually of the substance of the act." (*Ingoldsby v. Juan*, 12 Cal. 577.)

What, then, was the object and purpose of the Sole Trader Act? It was, says this Court, designed for the protection of married women against thriftless and improvident husbands. To use the language of the Court: "They (the Legislature) designed to afford to every married woman an opportunity of providing against the improvidence or misfortunes of her husband," etc. It was a beneficial act, and one designed to remove disabilities from the wife otherwise existing under coverture; it is therefore an enabling act, and will, by the Courts, be liberally and beneficially construed.

In *Goode v. Smith & Wife* (13 Cal. 81), the certificate to

the wife's acknowledgment omitted the words "undue influence," and the Court held that the certificate was sufficient; nor does the certificate in that case assert in the language of the statute, "that the contents of the deed were made known to her;" but, in lieu thereof, "well knowing the contents thereof," after due explanation by me made; and yet the Supreme Court say the variation in form shall not vitiate her act.

The Court there gives this liberal construction, notwithstanding the construction of the statute then passed upon was designed to allow the wife, with all the safeguards thus thrown around her, to alienate her common property in the homestead; which statutes, removing disabilities for the purpose of acquiring property by the class of persons so laboring under disabilities, have always been liberally construed. (See, also, *Brewster et al. v. Ludkins et al.*, 19 Cal. 162.)

It being shown that plaintiff was a sole trader, and had taken the requisite steps to constitute her such, none of the presumptions which follow from coverture, can be indulged or assumed. This Court has well said: "Presumptions are indulged to supply the absence of facts, but never against ascertained and established facts." (*Boggs v. Merced Mining Co.*, 14 Cal. 375; *Heirs of Nieto v. Carpenter*, April Term, 1863.)

The fact that plaintiff is doing business as a sole trader, and that this property is employed by her in her business as a sole trader, being first established as a fact, no conclusion will or can be presumed directly in opposition to those facts. A presumption belonging exclusively to coverture, cannot be applied to a relation which does away with all the effects and disabilities consequent upon such coverture. In the case of *McKune v. McGarvey & McKeon* (6 Cal. 497), this Court has said that, "the effect of the statute was to make such married woman a *femme sole* as to the particular business or profession in which she was engaged." And in *Guttman v. Scannell* (7 Cal. 455), the same principle is affirmed; and though Justice Burnett dissented in that case it was not upon this point of decision. And in *Alverson v. Jones et al.* (10 Cal. 9), Justice Burnett, in giving the opinion of the Court, says: "The right of the wife to acquire property by purchase, during marriage,

can only exist as an exception to the general rule, as laid down in section second. This exception does exist in the case of a sole trader under the statute." And in the same case, the Court says: "The purchaser under execution to recover possession of the property would have on his part to prove: First, the marriage; second, the conveyance to the wife; third, conveyance to him; fourth, possession in defendants. This would give him a *prima facie* right to recover. To overcome this *prima facie* case, the wife would have to show that she was a sole trader at the time of the conveyance to her," etc. That she had "complied with the conditions prescribed by the statute."

If, then, the fact being established that the wife is a sole trader will overcome the *prima facie* case, arising from the purchase by the wife, made during coverture, *ergo*, this fact once established, viz.: that the wife is a sole trader, overcomes all other presumptions which spring from the marital relation, concerning her property. In other words, the premises would then be destroyed, which would otherwise support the presumption; the *prima facie* case gone, there would be no premises to support the presumption.

Meyer v. Kinzer & Wife (12 Cal. 247), is the leading case upon the point urged by appellants of presumption of common property.

That decision was based upon the act defining the rights of husband and wife, and upon the cases cited from the Supreme Courts of Texas, Louisiana, and Pennsylvania.

The Sole Trader Act is a special statute perhaps not existing in the statutes of any other State. It was passed about two years after the statute defining the rights of husband and wife was passed; therefore, the class of cases falling under the Sole Trader Act must constitute exceptions to the general rules laid down by this Court in the case of *Meyer v. Kinzer & Wife*, before cited.

The Sole Trader Act was designed, says the Court in the case of *McEwen v. Garvey*, before cited, "to invest the wife with peculiar privileges as a *femme sole*."

The decisions, therefore, made upon the act defining the rights of husband and wife, cannot control the Sole Trader Act, passed long thereafter. But when the first act conflicts with the latter, the last

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act must control the former act ; nor can those decisions be authority upon a statute designed solely as an exception to the statute upon which they are based, concerning the marital relation.

CROCKER, J. delivered the opinion of the Court—COPE, C. J. and NORTON, J. concurring.

The plaintiff in this case is a married woman, and claims to be a sole trader. She brings this action to enjoin the defendant, Knowlton, the Sheriff of Nevada County, from selling certain real estate (claimed by her as her sole and separate property, acquired by her as such sole trader,) under an execution issued on a judgment against her husband. The plaintiff recovered judgment, and defendants moved for a new trial, which was denied, and they appeal from the judgment and the order refusing a new trial.

The deed to the plaintiff of the property in controversy is dated June 30th, 1860, and is made to her directly for the consideration of \$1,000, expressed to have been paid by her to the grantors. It is in the usual form of a deed of bargain and sale. She is not described in the deed as a married woman, nor does it purport to convey the property to her sole, separate, or exclusive use, nor does it state that she purchased the property as a sole trader. This Court has decided that a conveyance of this kind to the wife during coverture constitutes it *prima facie* common property. (*Meyer v. Kinzer*, 12 Cal. 247 ; *Tryon v. Sutton*, 13 Id. 490 ; *Alverson v. Jones*, 10 Id. 9.) And the burden of proof is on the wife to show that it is her separate property and not that of the community. As community property it is liable for the debts of the husband.

In this case the wife claims that she is a sole trader, and that she purchased it, and has used it to carry on her business as a sole trader. The burden of proof of this claim is upon her. (*Alverson v. Jones*, 10 Cal. 9.) To sustain her case she offered in evidence the following declaration :

“ State of California, County of Nevada : H. Adams, resident of Nevada City, and wife of P. Adams, hereby declares that she intends to carry on the business of restaurant and hotel keeping, accommodating boarders and lodgers, in the City of Nevada, and from this date she will be individually responsible in her own name

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for all debts contracted by her on account of her said business; that the amount of money invested in said business does not exceed or equal five thousand dollars. H. ADAMS.

"Subscribed and sworn to before me, this third day of July, 1857. J. J. CALDWELL, Notary Public."

This declaration was also duly acknowledged and was recorded in the Recorder's office of Nevada County, among the records of separate property of married women. The Sole Trader Act requires that she "shall make a declaration before a Notary Public, or other person authorized to take acknowledgments of deeds, that she intends to carry on business in her own name and on her own account, specifically setting forth in her declaration the nature of the business, trade, profession, or art; and from that date she shall be individually responsible in her own name for all debts contracted by her on account of her said trade, business, profession, or art," etc. The requirements of the statute are plain and simple. There are three essential facts to be stated in the declaration—first, that she intends carrying on some certain business, specifically describing it; second, that she intends to carry on such business in her own name, and, third, on her own account. Both of these last requisites are omitted in this declaration, whether intentionally or by mistake of the person writing it does not appear, nor can it make any difference how it occurred, as in either case the defect is fatal. The statute is in derogation of the common law, and the rights conferred by it can only be acquired by at least a substantial compliance with its provisions. The facts omitted in this case are of a substantial character, and essential to the validity of the declaration. We look in the instrument in vain to find any language of equivalent import. The statement that "she will be individually responsible in her own name for all debts contracted by her on account of her said business," is but copying what the statute declares shall be the legal effect of the declaration when properly made and recorded. They do not state that she intends to carry on the business in her own name, or on her own account, but merely declares the extent to which she will be responsible. The declaration is insufficient to sustain her claim to hold this property as a sole trader.

The judgment is reversed and the cause remanded.

JULY TERM, 1863.

REPORTS OF CASES

DETERMINED IN

THE SUPREME COURT,

JULY TERM, 1863.

COHEN *v.* WRIGHT.

THE Act of April 25th, 1863, requiring attorneys at law and litigants to file affidavits of allegiance to the Government of the United States as therein prescribed, is constitutional.

Sec. 3 of Article 11 of the Constitution, containing the form of oath to be administered to State officers, does not prohibit the Legislature from prescribing an oath to such officers in a different form of words from that therein used, if the meaning, object, and intent of the section be not violated.

An attorney at law is not a person holding an "office of public trust," within the meaning of those terms as used in the prohibitory clause of Sec. 3, Art. 11, of the Constitution.

The right to practice law is not a natural or constitutional right, but a statutory privilege, subject to the control of the Legislature. The exclusion of an attorney by a test oath is not in the nature of a punishment for a criminal offense, but a denial of a privilege forfeited by failure to comply with a prerequisite condition.

Courts without any special statutory provision may strike from the rolls an attorney guilty of disloyalty or treasonable acts, under their general power of supervision over the morality of their own officers. They may also require an attorney to whom such offense is imputed, to purge himself therefrom by his own oath.

The right to practice law is not "property," nor in any sense a "contract," within the constitutional meaning of those terms.

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Courts cannot declare a law void, upon the ground that it is contrary to "the spirit and policy of the Constitution," unless it is at variance with some express or clearly implied provision of that instrument.

The payment by a lawyer, of a United States license tax, imposed by the Revenue Law of 1862, does not entitle him to practice his profession without taking the oath prescribed by the State law.

There is nothing in the Constitution which prohibits the Legislature from closing the doors of the Courts against traitors and their aiders and abettors, or which requires that this shall not be done until after conviction of the crime in a regular criminal trial; or which prohibits the Legislature from requiring of those litigating in the Courts, that they shall purge themselves by their own oath of the imputed offense before they shall claim their aid.

The citizen cannot demand protection from the Government without he renders to it the equivalent of obedience and support. When he refuses this obedience and support, and aids, assists, countenances, or encourages those who are struggling to overthrow the Government, he forfeits all right to the use of its Courts.

The State may exclude from its Courts those who are guilty of disloyalty to the nation of which the State is a part, as well as those disloyal to the State Government directly.

The Act of April 25th, 1863, requiring from litigants an oath of allegiance, operates not upon the right of action but upon the remedy alone, which is subject to legislative control, and the Act does not so burden the remedy as to render it useless or impracticable.

APPEAL from the Twelfth Judicial District.

The facts are stated in the opinion of the Court.

Nathaniel Bennett, for Appellant.

I. The Legislature has no constitutional right or power to pass an act punishing disloyalty to any Government, but the State Government. But this act is an effort to enforce loyalty to a sovereignty other than that of the State. This State has no right to punish crimes of any kind against any other State or Government. The State cannot punish crimes committed beyond its territorial jurisdiction. But the oath requires a person to swear that he has not committed the imputed offenses anywhere, either within this State or without. The Constitution of the United States does not regulate the punishment of crimes against a State. (*Barker v. The People*, 3 Cow. 702, 703.) Neither does the State Con-

stitution contemplate the punishment of crimes against the United States.

Again: the terms "Government of the United States" in the oath must mean something different from the "Constitution of the United States" and the "Constitution of the State of California," for these two have previously been mentioned in the oath. Consequently, these terms can mean nothing else than the Government as at present administered, in other words, the present administration. The oath also speaks of "the lawful Government of the United States."

II. The act is in violation of the United States Tax Law, approved July 1st, 1863, with amendment of Act of March 4th, 1863, Sec. 64, Sub. 31. The operation of this Act of Congress is to authorize every person who has paid his license, to practice as a lawyer during the term through which the license extends. (*In re Kirk*, 1 Parker's C. C. 67; *Freeman v. Robinson*, 7 Ind. 321; *Tupper v. Newton*, 26 or 36 Eng. Law & Eq. 336; *Selemans v. Miller*, 20 or 12 Id. 353.)

III. The act is intended as a punishment of treason. If so, it punishes in advance of conviction or trial, and inflicts a punishment for an imputed offense which is not treason. The definition of treason is given in the Constitution. (Constitution, Art. 1, Sec. 20; *United States v. Hanway*, 1 Wallace, Jr. 199, 200.)

IV. The act operates as a denial of justice—a governmental crime, which has been vigilantly guarded against since the *Magna Charta* of King John. *Nulli negabimus, nulli vendemus justitiam.*

V. The act mentions two different oaths. Which one is to be taken by attorneys? Here is an ambiguity which renders the act nugatory. For where an act so highly penal, can be expounded with equal propriety in two different ways, it cannot be enforced at all.

VI. The act of the Legislature is a violation of Sec. 20 of Art. 1 of the State Constitution, which declares that "treason against the State shall consist only in levying war against it, adhering to its enemies, or giving them aid and comfort."

VII. Again: By Sec. 8, Art. 1, "no person shall be compelled in any criminal case, to be a witness against himself," and

“no person shall be held to answer for a capital or otherwise infamous crime, unless on presentment or indictment by a grand jury.” But the act authorizes a proceeding against a person on the ground of disloyalty—in other words, incipient treason—which would not be sanctioned by the Constitution against treason itself. Treason, by the Constitution, consists of an overt act—by this statute, it is made to consist of thought unexpressed. And a person is made, negatively, a witness against himself, without a criminal charge even being preferred against him. He is compelled to exonerate himself from a criminal charge, before it is preferred against him. He must prove himself innocent, before any evidence is produced of his guilt. But the crime impliedly charged, consists only in actually levying war. A conspiracy to subvert the Government is not treason. (*Ex parte Bolman*, 4 Cranch, 75; 2 Burr’s Trial, 401–439.)

VIII. It violates Sec. 18 of Art. 11, which provides “that laws shall be made to exclude from office,” etc., “those who shall hereafter be convicted of bribery, perjury, forgery, or other high crimes.” This enumeration excludes all others. This law excludes, in effect, an attorney from his office, by imposing such penalties as to preclude him from receiving the emoluments of his office, unless he shall take an oath not warranted by the Constitution. But, if a law cannot be made, in a given instance, to “exclude from office,” it cannot be made to deprive one of office after he has attained it. (See *Barker v. The People*, 3 Cow. 686, 703.)

IX. The act violates the Constitution of this State (Art. 11, Sec. 3) by requiring of attorneys a different oath from that specified in the Constitution. Attorneys are officers within the meaning of that clause in the Constitution. (*In re Application of Cooper*, 22 N. Y. 84, 92; *Fletcher v. Dangerfield*, 20 Cal. 427; *In re Daniel Wood*, 1 Hop. 6; *In re Attorneys’ Oaths*, 20 J. R. 492; *Waters v. Whittemore*, 22 Barb. 593, 595; *Seymour v. Ellison*, 2 Cow. 13, 23–29; *Ray v. Birdseye*, 5 Denio, 627; *Hobby v. Smith*, 3 Cow. 588; *In re Dorsey*, 7 Port. Ala. 295; *Leigh’s Case*, 1 Munf. 468; See also, 10 Paige, 356; 2 Denio, 607; *Barnardiston’s Ch.* 478; 3 How. Pr. 402; 3 Barb. 196; And see further, 5 J. R. 369; 9 Id. 253; 3 Caines, 221; 4 Greenl. 532; 2 Cow. 589.)

This clause of our Constitution was adopted from the New York Constitution of 1822, under which the above decisions were made. And where a constitutional provision of one State is adopted by another, the construction given by the Courts of the former State, is presumed to have been adopted by the latter State. (*Attorney General v. Brunst*, 3 Wis. 787.) Our statutes are full as to the admission, etc., of attorneys. (See Wood's Digest, 65-67.)

X. The act violates Sec. 6 of Art. 1 of the Constitution, which declares that "cruel or unusual punishments shall not be inflicted," nor "excessive fines imposed." It is a cruel, or, if not, at least, an unusual punishment, to deprive a person of all his rights of property, and especially before he has been convicted of any offense. All punishments must be proportioned to the nature of the offense, and when they are not, they become cruel, or unusual. The fine of \$1,000 imposed on attorneys for neglecting to take the oath is "excessive," within the meaning of the Constitution. The Statute of New York of 1813, in relation to dueling, prescribing an oath remotely analogous to the present oath, was deemed by the profession to be unconstitutional under the Constitution of 1777, in which Constitution was not contained the clause respecting oaths embodied in the Constitution of 1822, and which clause has been transferred to our own Constitution. (See B. F. Butler's argument in *Barker v. The People*, 3 Cow. 687, 688.)

XI. The act violates Sec. 1 of Art. 1 of the Constitution, which declares that "all men" * * * "have certain inalienable rights, among which are those of * * * acquiring, possessing, and protecting property, and pursuing and obtaining happiness."

This act deprives a man of the right of protecting his property. The guaranty of the Constitution, as to property, is the same as to life, or liberty. If a person can, by such an act, be prevented from protecting his rights of property, he may equally well be prevented from defending his life or liberty; as, indeed, he is by this act—for if his person be assaulted he cannot maintain an action. If his character be slandered, he is remediless. If his domestic relations be interfered with, he is without redress.

XII. It violates Sec. 3 of Art. 1, which declares that "the right of trial by jury shall be secured to all, and remain inviolate forever."

The act has the effect of taking away a person's rights and property without a trial by jury.

XIII. It violates Sec. 16 of Art. 1, which declares that "no law shall be passed impairing the obligation of contracts."

This law has the effect of impairing the obligation of contracts between attorneys and their clients. And as to parties to suits—taking away the remedy, or so far changing it as to affect the substance of the contract which may be in suit, necessarily impairs it. (See *People v. Hays*, 4 Cal. 127; *Seale v. Mitchell*, 5 Id. 402; *Bronson v. Kinzie*, 1 How. U. S. 311; *McCracken v. Hayward*, 2 Id. 608; *Quackenbush v. Danks*, 1 Denio, 128; *Same*, 3 Id. 594.)

XIV. It violates the latter clause of Sec. 8 of Art. 1, which declares that "no person shall be compelled to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law." (*Greene v. James*, 2 Curtis' C. C. 187-189; *Wynhamer v. The People*, 3 Kernan, 378; *Ervine's Appeal*, 16 Penn., 4 Harris, 256; *Butler v. Palmer*, 1 Hill, 324; *Morris v. The People*, 24 Barb. 232; *Taylor v. Porter*, 4 Hill, 140.)

It violates the clause in the same section which guarantees that a "party accused shall be allowed to appear and defend in person and by counsel."

Under this law every person in the State may be accused, and he is required to clear himself by his own oath, instead of being allowed to appear and defend against the accusation "in person and by counsel."

XV. The act violates the spirit of the Constitution; in other words, the fundamental principles of a free government. (See *Barker v. The People*, 3 Cow. 689—Butler's argument; *Calder et al. v. Bull*, 3 Dall, 386; *Fletcher v. Peck*, 6 Cranch. 87, 135; *Green v. Biddle*, 8 Wheat. 1, 88.) The act has the effect of taking the property of one person and giving it to another. The Legislature has no power to do this. (*Taylor v. Porter*, 4 Hill, 140.)

XVI. An act of the Legislature, in theory, is to endure forever, unless it be limited to a shorter period by its own terms. True, it may be repealed, but this does not enter into the contemplation of

the act itself. It must be tested by the same rule as if it were to be permanent.

The act under consideration cannot stand this test, and be held constitutional. Suppose the present war closed, and some of those persons now in arms against the United States should settle in California. Test this act by a suit in which such a person might become engaged. The result is palpable.

XVII. The admission of an attorney is a judicial act, as much so as any other judgment of a Court. (*In re Cooper*, 22 N. Y. 67, 81, 82, 84-86.)

The admission of an attorney being a judicial act, his deprivation of the office can only be by a judicial act.

XVIII. The act should have only a prospective effect—that is, it should be construed so as to operate only upon attorneys, etc., admitted since the passage of the act. Courts always construe such laws so that they shall not operate retrospectively. (*Plumb v. Sawyer*, 21 Conn. 351 or 381; *Kennett's Petition*, 4 Foster's N. H. 139; *Thorn v. —*, 4 Cal. —; *Scott v. McGlynn*, 21 Id. 576, 277; *Danks v. Quackenbush*, 1 Denio, 128; *Same*, 3 Id. 594; *The People v. Mayor, etc.*, 6 Barb. 209; 1 Comstock, 129; *Sackett v. Andross*, 5 Hill, 334-337, and 362-365.)

XIX. Suppose two or more persons, plaintiffs or defendants to a suit, and notice served on one, who refuses to take the oath, what is to become of the suit as to the other co-plaintiffs or co-defendants? The act says the suit shall be "absolutely dismissed, and no other suit shall ever be maintained," etc.

Again, suppose a party is a non-resident of the State. He may not have heard of the act until months after the time of its taking effect, but he is required to swear as to the matters prescribed by the oath, from the twenty-fifth day of April, 1863. He may have been compelled, in the State of his residence, to take an oath directly the reverse of this.

Again, suppose the party to be a foreigner, a subject and resident, for instance, of England. Compelling him to take the oath, infringes the treaties between Great Britain and the United States, which respectively guarantee to the citizens of each government the right to appeal to the courts of justice for the enforcement and protection of their rights.

XX. Every person has a constitutional right of eligibility to office, unless he has been convicted of some crime. (*Barker v. The People*, 3 Cow. 706, 707, 708; *In re Dorsey*, 7 Porter, Ala. 293.) The Legislature might, with the same legal propriety, debar a man of the right to prosecute or defend a suit unless he would make oath that he had not, since the twenty-fifth day of April, "aided, assisted, countenanced, or encouraged," the commission of murder or any other crime, and that he would not do so hereafter. The principle is the same in both cases. Or, the Legislature might require an oath, that he had not used profane language; or, that he had attended and would attend church every Sunday; or, that he would not aid, etc., the Odd Fellows or Masonic societies; or, that he would not break the Sabbath; or, that he had not since the twenty-fifth of April, aided, etc., and would not henceforth aid, etc., dueling; or, this oath might as well be required as a qualification for voting; or, it might as well have been required of the Judges of the old Superior Court of San Francisco. This Court depended for existence on the statute. It was not a constitutional Court. The Legislature might as well have required such an oath of those Judges before a suit could proceed in their Court; or, the Legislature might say that the purchaser of goods from a merchant or mechanic, on credit, might serve the notice mentioned in the statute, and unless the merchant or mechanic, within ten days after such service, should take the oath, he should forever be debarred from bringing suit to recover the demand. Or, this oath might be required of all clergymen, before preaching their next sermon, under the penalties of the act; and of physicians, before drawing their next prescription; and of dentists, before extracting their next tooth; and of gamesters, before playing their next ante; and so on, through all departments of business, and all ramifications of society. Or, the Legislature might say that a man shall not have the right of defending his own life, his person, his family, or his property, when lawlessly assailed, unless he had taken this oath.

The act imposes a penalty beyond the reach of executive clemency. (See *In re Dorsey*, 7 Port. 295.)

E. W. F. Sloan, also, for Appellant.

The object of every Act of the Legislature is required to be expressed in the title. This bears the imposing title of—"An Act to exclude Traitors and Alien Enemies from the Courts of Justice in Civil Cases."

The object, then, of this act, is to deny all redress for civil injuries, to traitors and alien enemies; and to prohibit traitors from practicing law in the Courts of Justice in this State. It undertakes to make the failure to take the prescribed oath an act of treason against the United States.

Whence did the Legislature of California derive the power to enact a law of that character? The Congress of the United States can provide for the punishment of treason, but cannot make that an act of treason, which is not made so by the Constitution. The Federal Constitution declares that: "Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort." (Art. 3, Sec. 3.) It further provides that: "No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open Court."

The power of Congress extends only to declaring the punishment; and even in that respect, it is expressly limited. "No attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted."

The Legislature of California has not, even, the power to declare what shall be treason against the State. The Constitution of the State provides that: "Treason against the State shall consist only in levying war against it, adhering to its enemies, or giving them aid and comfort."

It is perfectly evident, therefore, that the Legislature cannot prescribe a test oath, and make the failure to take it an act of treason, either against the State of California, or the United States; and that, in attempting to do so, it has clearly transcended its powers.

The Statute of 1851 provides that each attorney and counselor in this State, before his admission to the bar, shall take an oath to support the Constitution of the United States and of the State of California, and to discharge the duties of attorney and counselor to the best of his knowledge and ability. It is the oath prescribed by

Sec. 3, Art. 11, of the State Constitution. All officers, legislative, executive, and judicial, are required to take the same form of oath, before entering on the duties of their respective offices. And the Constitution declares that: "No other oath, declaration, or test, shall be required as a qualification for any office or public trust."

The Constitution seems to have exhausted the subject of test oaths. As to all superior officers, the form and extent of the oath are fixed by it. The power of the Legislature over the subject is limited to that of exempting inferior officers altogether. Attorneys and counselors are officers of the Courts, and as such were required by the Statute of 1851, to take the oath prescribed by the Constitution for other officers. As inferior officers, they might have been exempted by the Legislature, but no other form of oath could be imposed except that prescribed by the Constitution. It would have been strange and inconsistent, indeed, if the Constitution had authorized the Legislature to impose upon attorneys and counselors more comprehensive oaths than it had prescribed for those who were elected to fill offices of the highest dignity and trust in the State.

But apart from all this, what was supposed to be the defect in the then existing laws which the Legislature intended to cure by the act in question?

Was the obligation to support the Constitution of the United States and of the State of California, by which all attorneys and counselors were solemnly bound, not deemed sufficiently comprehensive to exclude traitors from the practice of the law?

It is undeniably true, that a person may support the Constitution of the United States, whilst he openly disapproves of every unconstitutional measure of the Federal Government. It is impossible to yield to such a measure without, to the same extent, withdrawing support from the Constitution. We have no such political maxim here as that the Government can do no wrong. The exercise of supreme power is government. But supreme power may be, and often has been, usurped. The infallibility of the Government is a doctrine not to be found in the Constitution of the United States. When it declared that: "This Constitution and the laws of the United States, which shall be made in pursuance thereof, etc., shall

be the supreme law of the land," it recognizes the liability of the Government to overstep the constitutional limits of its authority. If Congress should pass an act, with the sanction of the Federal executive, "respecting an establishment of religion, or prohibiting the free use thereof, or abridging the liberty of speech, or of the press," no one would pretend to say that it was a law made in pursuance of the Constitution. It would be no part of the supreme law of the land, and the Judges in every State would not be bound thereby. It would be the duty of the Judges to declare it void. The Government might, nevertheless, seek to enforce it by the employment of military power, and if successful, however unconstitutional the measure might be, it would still be the act of the Government. No one can deny this; and yet, all who oppose, or resist, would, in the opinion of the Legislature, be guilty of disloyalty.

The Legislature, evidently, did not regard the obligation to support the Constitution of the United States, and of the State of California, as comprehending that of bearing "true faith and allegiance to the Government of the United States." If the latter obligation is not comprehended by the former, it is, necessarily, repugnant to it.

How can any one conscientiously swear that he will bear true faith and allegiance to the Government of the United States, whatever policy it may pursue, or whatever measure it may adopt, whilst he also swears that he will support the Constitution which limits the powers of that Government? It is no answer to say that the Government may always act under authority of, and in harmony with, the Constitution. The obligation to bear true faith and allegiance to the Government is not made, by the language of the act in question, to depend upon that condition. I cannot perceive how any one can take the prescribed oath without committing perjury in the very act of taking it.

The plaintiff is allowed, if a resident of the county, ten days within which to subscribe and file the oath; if a resident of the State, without the county, forty days; if a non-resident, he is allowed such time as the Court or a Judge thereof may determine. Upon the failure of the plaintiff to take the prescribed oath within

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the allotted time, the case is to be dismissed, and no other suit can ever be maintained by said plaintiff, his grantees, or assigns, for the same cause of action. No exception is made in favor of the lunatic who appears by his committee, or the infant who sues by his *prochein ami*, or guardian *ad litem*.

The effect of the notice is a stay of all proceedings in the prosecution of the cause; the consequence of the plaintiff's failure to comply, is a perpetual bar to the recovery of the demand.

The defendant is not required to allege facts against the plaintiff upon which the latter might take issue; he is subjected to no responsibility—not even to that of a common informer; the vague charge of disloyalty is but inferentially made in the form of a notice. But the moment the notice is given, the protecting power of the law, so far as the rights of the plaintiff are concerned, is instantly suspended, until he takes an expurgatory oath. If he declines, he becomes an outlaw.

No matter how blameless his life may have been; no matter how patriotic, how honest, how pure and conscientious, he must take the oath, or be placed beyond the protection of the municipal law, and branded as a traitor.

Treason against the State is defined by the Constitution of the State; nothing can be added by the Legislature. There is such a crime as treason against the State; but the Legislature may not have been aware of it. And no person can be held to answer for such crime, unless on presentment or indictment of a grand jury; and, in any trial, the party accused shall be allowed to appear and defend in person and with counsel; and, touching the truth of the charge, a jury trial is secured to him. Nor can the party accused be convicted of treason, unless on the evidence of two witnesses to the same overt act, or confession in open Court. These are the inalienable rights of every citizen of the State which the Legislature cannot take away.

Treason against the United States is defined by the Constitution of the United States, and nothing can be added, even by Congress. The Legislature of California can have no power to impose upon the citizens of this, or any other State, a new political status in reference to the United States. That is unalterably established by

the Federal Constitution, and cannot be changed, except by an alteration of the instrument itself.

That Constitution contains the full measure of all my political obligations, in respect to the Federal Government. If the Legislature of this State can enlarge these, they can also diminish them. I deny its power to do either.

“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people.” The State Legislature cannot, therefore, surrender into the hands of the Federal Government any of the powers so reserved, under any pretext whatever. It has no right to abnegate the constitutional power and dignity of the State.

The principles and tendency of the act in question are vicious. Such legislation strikes at the very foundation of civil liberty. Its bitter fruits will, sooner or later, appear. If indulged in, “it must destroy the balance of the Government, and, in the end, the Government itself.”

Pixley, Attorney General, for Respondent.

CROCKER, J. delivered the opinion of the Court—NORTON, J. concurring specially.

This is an action to recover the sum of three hundred and fifty dollars, an indebtedness alleged to be due from the defendant to the plaintiff. It was commenced on the nineteenth day of June, 1863, by H. E. Highton, as attorney for the plaintiff. On the same day an appearance was entered by the defendant, and notice given that he objected to the further prosecution of the suit, for the reason that the plaintiff was disloyal to the Government of the United States. On the same day a stipulation was filed, in which the plaintiff waived the ten days' time allowed by law to file his affidavit of allegiance, declined to file it, and it was agreed that a motion for dismissal of the suit might be submitted to the Judge of the Court below for failure to file such affidavit, with the same effect as if the ten days had expired. The Court granted the motion to dismiss, and judgment was accordingly entered that the action be dismissed; that no other suit be maintained by the plaintiff for the same cause

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of action, and that the defendant recover his costs. From this judgment the plaintiff appeals to this Court.

When the case was submitted in this Court, Highton appeared, as the attorney of the appellant, to argue the case on his behalf, and it was objected that he had not made and filed the affidavit of allegiance required by Sec. 3 of the Act entitled "An Act to exclude Traitors and Alien Enemies from the Courts of Justice in Civil Cases," approved April 25th, 1863. It was admitted that he had paid to the United States Tax Collector the tax of ten dollars imposed upon lawyers by the United States Revenue Law of 1862, but had not filed the affidavit of allegiance required by the third section of the above law of this State.

These facts present two important questions for adjudication: 1st. Is the Act of April 25th, 1863, so far as it requires attorneys at law to file an affidavit of allegiance, constitutional and valid? 2d. Does the same act, in requiring parties litigating civil cases in the Courts of Justice to file such affidavit, violate the Constitution?

Sec. 1 of the law in question provides that the defendant in any civil suit pending in any Court of Record in this State, may object to the further prosecution of the suit on the ground of the disloyalty of the plaintiff, and that all proceedings therein shall be stayed until the plaintiff shall file in the case an affidavit in the following form, to wit: "I, [here insert the name of the plaintiff] do solemnly swear that I will support the Constitution of the United States and the Constitution of the State of California; that I will bear true faith and allegiance to the Government of the United States, any ordinance, resolution, or law of any State or Territory, or of any Convention or Legislature thereof, to the contrary notwithstanding; that I have not, since the [here insert the date of the passage of this act] knowingly aided, encouraged, countenanced, or assisted, nor will I hereafter, in any manner aid, encourage, countenance, or assist the so-called Confederate States, or any of them, in their rebellion against the lawful Government of the United States; and this I do without any qualification or mental reservation whatsoever. So help me God."

The same section also provides the form of oath to be taken by

a plaintiff who is a foreigner and has not been admitted to citizenship; and also that if the plaintiff shall fail to file this affidavit within certain periods of time fixed by the act, or to be fixed by the Court, in case the plaintiff is a non-resident of the State, the "case shall thereupon be absolutely dismissed, and no other suit shall ever be maintained by the said plaintiff, his grantees or assigns, for the same cause of action."

Sec. 2 provides for the filing of the same affidavit by a defendant who sets up a counter claim or new matter in his answer, with the same effect if he shall fail to comply with the law.

Sec. 3 reads as follows: "No attorney at law shall be permitted to practice in any Court in this State until he shall have taken and filed in the office of the County Clerk of the county in which the attorney shall reside, the oath prescribed in this act; and for every violation of the provisions of this section, the attorney so offending shall be considered guilty of a misdemeanor, and on conviction shall be fined in the sum of one thousand dollars." Such are substantially the provisions of the act we are called upon to consider.

1. The first question we will examine is that relating to attorneys at law. It is insisted that the statute violates Sec. 3 of Art. 11 of the Constitution of this State, which reads as follows: "Members of the Legislature, and all officers, executive and judicial, except such inferior officers as may be by law exempted, shall, before they enter on the duties of their respective offices, take and subscribe the following oath or affirmation: 'I do solemnly swear [or affirm, as the case may be], that I will support the Constitution of the United States and the Constitution of the State of California, and that I will faithfully discharge the duties of the office of — according to the best of my ability.' And no other oath, declaration, or test shall be required as a qualification for any office or public trust." It is insisted that an attorney at law is an "officer;" that the privilege he exercises is an "office" within the intent and meaning of this section, and that the affidavit required by the statute in question is another and a different oath, in the nature of a test oath, imposed as a qualification for the office, and that the law therefore conflicts with the Constitution.

Before proceeding to investigate these points, it may be well to refer to some rules adopted for the construction of constitutional provisions, as a guide to the examination. Thus it is held, "that the Constitution of this State is not to be considered as a grant of power, but rather as a restriction upon the powers of the Legislature; and that it is competent for the Legislature to exercise all powers not forbidden by the Constitution of the State, or delegated to the General Government, or prohibited by the Constitution of the United States." (*People v. Coleman*, 4 Cal. 46; *Vermule v. Bigler*, 5 Id. 23; *Hobart v. Supervisors of Butte County*, 17 Id. 23; *People v. The Judge of the Twelfth District*, Id. 547.) Such restriction must appear, either by express terms or by necessary inference. (*State v. Rogers*, 13 Cal. 159.) "The delicate office of declaring an Act of the Legislature unconstitutional and void should never be exercised unless there be a clear repugnance between the inferior and the organic law." (*People v. Burbank*, 12 Cal. 378.) It is well settled that this power is not to be exercised in doubtful cases, but the will of the Legislature must be respected by the Courts, unless the act declaring it be clearly inconsistent with the fundamental law. (*People v. Judge of the Twelfth District*, 17 Cal. 547.) "It has been repeatedly held that to warrant the Courts in setting aside a law as unconstitutional, the case must be so clear that no reasonable doubt can be said to exist." (Sedgwick on Stat. and Const. Law, 592.) "It is not on slight implication and vague conjecture that the Legislature is to be pronounced to have transcended its powers, and its acts to be considered void." (*Fletcher v. Peck*, 6 Cranch, 128.)

The first point to determine is, whether this act does impose an oath or test substantially differing from that prescribed by the Constitution. All civilized Governments require their officers to take what, by other nations, is termed the oath of allegiance, by which the party swears to bear true faith and allegiance to the reigning sovereign; but as our highest public officers, State and National, are not vested with the right of sovereignty, it was necessary to change the *form* of the oath, and thus the officer is required, by both the National and State Constitutions, to swear to support the Constitution—the Constitution being used as the representative of

the sovereign power. But the true spirit, intent, and meaning of the constitutional oath is to bear true faith and allegiance to the National and State Governments. It certainly was not the intention that the officer should merely swear to support the parchment on which the Constitution was written, or the paper on which it might be printed, but to support the Government organized by that instrument. Nor in thus taking the oath to support the Government does the officer swear allegiance to the individuals who administer it. It is fidelity to the Government that was organized by the Constitution, that has existed ever since, and is intended to exist through all coming time, as administered by the official agents of the people, that is required. Such being the object of the constitutional oath, does the affidavit required by the act go beyond it, and require other conditions? The first clause follows the language of the Constitution, and is not objected to. The second clause is but an amplification, or a more complete expression of the same terms, more fully defining the meaning of the previous clause, expressing in clear language its legal effect. The Constitution of the United States, is the supreme law of the land, and all citizens owe allegiance to the Government organized by it, "any ordinance, resolution, or law of any State or Territory, or of any Convention or Legislature thereof, to the contrary notwithstanding." This is but stating in plain terms, what is fully meant by the words, "support the Constitution of the United States." This clause therefore imposes no additional obligation. The next clause, that the party has not, since the passage of the act, and will not aid, encourage, countenance, or assist those now engaged in rebellion against the United States, is a solemn declaration and pledge; a declaration that the party has not committed, since the passage of the law, and a pledge that he will not commit, any treasonable act against the National Government. So far as it is a pledge of future good conduct, it is but expressing in another form that he will support the Constitution, and bear true allegiance to the United States, and to that extent clearly is not opposed to this section of our State Constitution. So far as it is a declaration of past conduct, it seems to go beyond the strict letter of the constitutional oath, and we have therefore had a doubt of its validity. It does, however, but carry

out the object, design, and spirit of the constitutional oath ; and as it is not an unreasonable requirement, being confined to acts since the passage of the law, and does not clearly violate the Constitution, we are unwilling to declare it void on a mere doubt. Probably the framers of the Constitution never imagined that the elective or appointing power could ever be guilty of placing traitors in office, and therefore did not see the necessity of making the official oath apply in express terms to past as well as future conduct. But although not directly expressed, it is clearly implied in the form of oath adopted. The last clause, that "this I do without any qualification or mental reservation whatsoever, so help me God," is but a full expression of what is clearly implied in all oaths, and cannot be held in any sense to violate the Constitution.

In our judgment it was not intended to limit the action of the Legislature to the particular set form of words used in the Constitution, and it is clearly within their power to prescribe any form, so that they do not go beyond the intent, object, and meaning of the Constitution. The history of the present rebellion has shown the necessity of so framing it that the essential spirit of the constitutional oath shall not be perverted, by sophistry and casuistry, from its true intent and meaning, and that the officer taking it may not do so with the secret or avowed intention of aiding in subverting the Government which he has really sworn to support, without palpably violating the oath in letter as well as in spirit.

A clause similar to the one under consideration is found in the Constitution of the United States, and reads as follows: "The Senators and Representatives before mentioned and the members of the several State Legislatures, and all executive and judicial officers, both of the United States and of the several States, shall be bound by oath or affirmation to support this Constitution ; but no religious test shall ever be required as a qualification to any office or public trust under the United States." Congress, in pursuance of this provision, on the second day of July, 1862, passed a law requiring every person elected or appointed to any office under the National Government, either civil, military, or naval, to take an oath that he had never voluntarily borne arms against the United States, or given any aid or encouragement

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to persons engaged in armed hostility thereto; that he had not attempted to exercise any office, under any pretended authority in hostility to the United States, or yielded any voluntary support thereto; that he will support and defend the Constitution of the United States against all enemies, foreign and domestic; that he will bear true faith and allegiance to the same; and that he takes the obligation freely, without any mental reservation or purpose of evasion; and declaring that any person who should falsely take such oath should be guilty of perjury, and on conviction should be deprived of his office and rendered incapable forever after of holding any office or place under the United States. This law was passed after a full and thorough discussion of the whole subject, and the instances in which Acts of Congress have been declared unconstitutional are very rare. The oath prescribed by the Act of Congress is far more stringent than the one under consideration, especially relative to the past conduct of the officer. The very first act passed by Congress was one regulating the form, time, and manner of administering the oath prescribed by the National Constitution, and it was made applicable to all legislative, executive, and judicial officers of the several States. And among the first laws passed by the Legislature of this State was one prescribing the form and manner of taking the oath of office. (Statutes of 1850, 207.) The power of Congress and of the State Legislatures to pass laws prescribing in detail everything requisite to properly carry out these constitutional provisions has never been doubted.

But is an attorney at law an "officer," and does he fill an "office" within the meaning of the Constitution? It is contended that as this clause was taken verbatim from the Constitution of the State of New York we are conclusively bound by the decisions of the Courts of that State in construing it; that in adopting it the judicial construction was adopted with it, and the case of *The Attorney-General v. Brunst* (3 Wis. 787) is referred to in support of this doctrine. This Court, we think, has announced the correct rule in such cases in *The People v. Burbank* (12 Cal. 387), where it says: "We might agree with the learned counsel that the Constitution must generally be construed more by its own terms than by the aid of authorities from other States; but this is

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only true where there is something peculiar in the matter to be construed. If the same words, *in the same or similar contexts*, have elsewhere received a definite construction, the authority is entitled to the same weight in this as in other cases." A well-settled construction of such a clause by the Courts of another State is certainly entitled to great weight, but not to a conclusive effect, such as would require us to blindly follow it.

No two Constitutions are precisely alike in all their provisions; rarely even in the wording of similar provisions; and in construing a Constitution, like any other instrument, it is subject to the general rule, that it is to be construed so as to reconcile and give meaning and effect to all its parts. (*The People v. Gerke*, 5 Cal. 381.) It is the duty of the Court to adopt such a construction as will carry out the plain intendments of the Constitution, in all its parts. (*The People v. Reid*, 6 Cal. 288.) The same clause in different Constitutions might, therefore, require different constructions to reconcile it with other and varying clauses.

Still, it is proper to examine the decisions of the Courts of New York made prior to the adoption of our State Constitution, to ascertain whether this clause had obtained a settled construction which could be considered as having been adopted with it. The first decision was made by the Supreme Court of that State in *The Attorneys' Oath Case* (20 Johns. 492.) The point was, whether an attorney or counselor holds an *office* or *public trust* in the sense of the Constitution, and therefore could not be required to take the anti-dueling oath. The Court says: "In my judgment, an attorney or counselor does not hold an *office*, but exercises a *privilege* or *franchise*. They enjoy the exclusive privilege of prosecuting and defending suits for clients who may choose to employ them. Various classes of persons are licensed in the City of New York, with an exclusive privilege in their employment; yet they are not public officers. Physicians are also licensed, pursuant to statutes, yet they hold no *office* or *public trust*, in legal construction. The fees of attorneys are fixed by law; and so is the compensation of *cartmen*, and *bakers*, and *ferry-men*." The opinion was delivered by Justice Platt, and concurred in by Justice Woodworth, Chief Justice Spencer dissenting, but delivering no opinion.

The next case was in the Court of Chancery (*Wood's Case*, 1 Hopkins' Chan. 6), in which Chancellor Sandford held that the station of a solicitor in chancery was an office within the meaning of the new Constitution, and therefore could not be compelled to take any other oath than that prescribed therein. The Chancellor says: "So far as the legal profession is an occupation open to all, there is no reason to consider a lawyer as a public officer. The exercise of this profession is in fact an occupation, in which every person is free to engage; but it is not so in respect to proceedings in the Courts of Justice." The reasoning of the Court is based mainly upon the ground that he is an officer of the Court, and therefore within this constitutional provision. That certainly cannot be called an office, in legal acceptance, "in which every person is free to engage."

The next case was in the Court of Errors. (*Seymour v. Ellison*, 2 Cowen, 13.) The counsel for one of the parties had recently died, and Judge Betts, who had formerly been counsel, appeared to argue the case. Justice Woodworth said that, "admitting there is no constitutional provision on the subject, I should hold it unfit for a Circuit Judge to act as counsel," and in this Sutherland, J. and Sudam, Senator, concurred. On the other hand, Chief Justice Savage said: "I think the constitutional ground the true one, and would refer the decision to this instead of general unfitness." The section of the Constitution alluded to provides that "neither the Chancellor nor Justices of the Supreme Court, nor any Circuit Judge, shall hold any other *office* or *public trust*, and he held that by acting as attorney he would be holding another "*office*." In this view Chancellor Sandford, who decided the case of Wood, concurred. The other members of the Court voted that he could not act as counsel, without giving their reasons. Thus we have Platt, Woodworth, Sutherland, and Sudam holding that a lawyer is not an officer within the Constitution, and Spencer, Savage, and Sandford the contrary. There are other cases in which this question has been indirectly before the Courts of that State, but these are the only ones in which this section of the Constitution was directly passed upon prior to the adoption of our State Constitution. It is clear that it had not then received a fixed, well-defined construc-

tion, and that, under the rule stated by counsel for the appellant, it is still open for judicial construction.

To construe this section to mean that a lawyer is an officer, would directly conflict with the well-established meaning of other provisions, in which the word officer is used. Thus, if it is an office it is one of profit, and an impeached officer would be disqualified from practicing the profession, under Sec. 19 of Art. 4; and Senators and Assemblymen, who should vote to regulate attorneys' fees, would be excluded from practicing law by Sec. 20; and a lawyer, admitted to practice under the laws of the United States, would be a "person holding a lucrative office under the United States," and would not "be eligible to any civil office of profit under this State," and so would be excluded from practicing in our State Courts, or holding any office, by Sec. 21, and could not be Governor under Sec. 12 of Art. 5. If it is an office, it is liable to become "vacant" by death, resignation, removal from the State, or otherwise, and would be governed by Sec. 8 of Art. 5. If it is an office, a lawyer must be a "judicial officer," for his duties relate mainly to Courts of Justice, and he has always been termed an officer of the Court. He would, therefore, be precluded from receiving, "to his own use, *any fees or perquisites of office*," a result which certainly never could have been intended by those who framed or voted for the Constitution. So, too, if he is an officer, he must be elected or appointed, as required by Sec. 6 of Art. 11, and the duration of the office cannot exceed four years, as prescribed by Sec. 7 of Art. 11. We might refer, in this way, to other provisions, but sufficient has been stated to show that the construction contended for is utterly irreconcilable with the plain meaning of the words office and officer, in almost every part of the Constitution, and this establishes that such is not its true intent and meaning in the section under consideration.

This question whether a lawyer is a public officer or not has been adjudicated in several cases. The Constitution of Alabama empowered the General Assembly "to pass such penal laws to suppress the evil practice of dueling, extending to disqualification from office, or the tenure thereof, as they may deem expedient;" and it was held that the term "office" as thus used, did not in-

clude attorneys and counselors at law. (*Dorsey's Case*, 7 Porter, 293.) An act of Virginia required that "every person who shall be appointed to any office or place, civil or military, under this Commonwealth," should take the anti-dueling oath; and it was held, in *Leigh's Case* (1 Mumford, 468), that a person who applied for admission to practice law was not an officer within the act, and could not, therefore, be required to take the oath. The Constitution of New York, adopted in 1846, in its provisions relating to the Judges of the Court of Appeals and the Supreme Court, provides that "they shall not exercise any power of appointment to public office." It was held that the admission of an attorney by the Courts to practice law is not an appointment to office, under this clause of the Constitution, and that the statute vesting the power of admission in the Courts was constitutional. (*Cooper's Case*, 22 New York, 84-92.) So, too, it was held in *Byrne v. Stewart* (3 Dessausure, 466), that a lawyer was not an officer within the Constitution.

Attorneys are officers of the Court, and as such are subject to the control of the Court before which they practice, which has power to summarily investigate the dealings and transactions between them and their clients in cases before it, as also to disbar them for misconduct and deprive them of the privilege of practicing their profession. The books are full of decisions in which they are termed officers in this sense. And in some cases the Courts have said, *arguendo*, that they are "public officers," on the ground that they receive stated fees fixed by statute and are subject to the control of the Court. (*Walmsby v. Booth*, Barnardiston Ch. 478; *Merritt v. Lambert*, 10 Paige, 352, affirmed without any opinion, under the style of *Wallis v. Loubat*, in 2 Denio, 607; *Waters v. Whittemore*, 22 Barb., S. C., 595.) But none of the cases we have been referred to hold directly, as a point actually decided in the case, that they are "officers," or "public officers," within the legal meaning of those terms when used in statutes and Constitutions, except the case of *Wood*, in 1 Hopkins Ch. 6, which is clearly overruled by the numerous cases to the contrary. We therefore hold that an attorney at law is not an officer, within the meaning of that term as used in the Constitution.

It is also contended that the act in question, so far as it applies to attorneys, violates numerous other constitutional provisions ; that it compels the attorney to answer to a crime, without any presentment or indictment by a grand jury ; that he is not allowed to appear and defend in person or by counsel, but is compelled to defend by his own affidavit ; that it compels him to be a witness against himself, and that it deprives him of his property—that is, his right to practice his profession—"without due process of law," in violation of Sec. 8 of Art. 1 ; that it deprives him of his property without a jury trial, which is secured by Sec. 3, Art. 1 ; that it imposes an "excessive fine," and inflicts a "cruel and unusual punishment," in depriving him of a right to practice ; that it deprives him of the freedom of speech and the right to "publish his sentiments on all subjects," secured by Sec. 9 of Art. 1 ; that if this right is abused, by the utterance or publication of treasonable sentiments, tending to aid, encourage, or countenance those in rebellion against the Government, it can only be punished by a criminal prosecution, and not by deprivation of his privilege to practice his profession ; that the law "impairs the obligation of contracts," by preventing him from fulfilling his contracts to serve his clients, and that his privileges are in the nature of a grant of a vested right from the Government, and therefore the statute violates Sec. 16 of Art. 1 ; that it violates the *spirit* if not the letter of the Constitution, because every person has a constitutional right of eligibility to office unless he has been convicted of some crime ; and that it excludes him from his office without any conviction of the crimes mentioned in Sec. 18 of Art. 11, and that the mention of crimes of a certain class in that section implies that the Legislature cannot exclude from office for any other offenses.

Sec. 3 of the law in question provides that the act of practicing as an attorney at law without having filed an affidavit of allegiance, shall be a misdemeanor, punishable by a fine of one thousand dollars, but that punishment can only be inflicted after a trial in due course of law ; and as it is not a "capital or infamous crime," the Constitution does not require that the proceedings shall be by indictment. The case before us not being one in which that portion of the act comes in question, it is unnecessary for us to determine whether

it imposes an excessive fine or a cruel and unusual punishment, or in any other respect violates the Constitution.

The exclusion of the attorney from the practice of his profession by this law, is not because he has committed any crime, nor is it in the nature of a punishment for any criminal offense. The right to practice law is not a constitutional right, for it is not mentioned in that instrument, or recognized, or established by it. It is a mere statutory privilege, not even rising to the dignity of an office, except in a very limited sense, as we have already shown. This privilege is, by the statute granting it, extended to all persons who comply with certain conditions. Before the passage of this act, the conditions were that he should be a white male citizen, twenty-one years of age, of good moral character, possess the necessary qualifications of learning and ability, procure a license from the Court to practice, and take the oath prescribed by the law. This act does but change the character and form of one of the former conditions, and requires the oath to be taken in the amended form, upon the noncompliance with which he is prohibited from practicing. It is not a crime for him to decline to comply with this new condition, by refusing to take the oath. The taking of it is now made a prerequisite to the exercise of the privilege. If the effect of his refusal is to exclude him from the practice, it is a result caused by his own voluntary conduct. In no sense is it a "punishment for crime," for the refusal to take the oath is not made a crime. A person may thus refuse who has never been guilty of any treasonable act, and has no intentions of that kind; and if he is prevented from practicing, it is by his own voluntary course. If there is any "punishment" in this it is self-imposed. A person who voluntarily locks himself up in a prison, and refuses to turn the key to let himself out, could with as much reason complain that he was deprived of his liberty, "without due process of law," in violation of the Constitution. We do not see how this conclusion is to be avoided, unless it can be shown that traitors in act and intention have a constitutional right to practice law.

The provision that "no person shall be deprived of life, liberty, or property, without due process of law," is one of the most essential protections against the exercise of arbitrary power by the Leg-

islature, and one that should be most carefully guarded by the Courts. The terms "due process of law" have a distinct legal signification, clearly securing to every person, whether a citizen or not, without distinction of sex or race, a judicial trial, according to the established rules of law, before he can be deprived of life, liberty, or property. These essential rights cannot be taken away by any mere declaration of legislative will, for the very object and purpose of this provision was to prohibit the Legislature from passing laws of that character. Any other construction would render this clause utterly nugatory. (*Wynehamer v. The People*, 3 Ker. 378; *Ervine's Appeal*, 16 Penn. 263; *Hoke v. Henderson*, 4 Dev. 1; *Jones v. Perry*, 10 Yerg. 59; *Taylor v. Porter*, 4 Hill, 140; *Embury v. Conner*, 3 Comstock, 511; *Powers v. Bergen*, 2 Selden, 358; *Westwell v. Grigg*, 2 Ker. 202; *Butler v. Palmer*, 1 Hill, 324; 2 Kent, 13; *Murray's Lessee v. Hoboken Land Company*, 18 How. U. S. 272.)

The great principle is, that a man's life, liberty, and property, is his own; that he shall enjoy them as may best please himself, provided he injures no other person, until it is proved in due course of law that he has forfeited his life or liberty, or that the property is not his, but belongs to another. It is a direct prohibition upon the Legislature from passing any law depriving any person or class of persons of life, incarcerating in prison, selling or holding in slavery, or in any other way taking away their liberty, or divesting them of any property, whether real or personal, held, owned, or possessed by them, or the right to acquire and own property, except by a due and regular proceeding according to the course of the common law regulating proceedings of like character, and usually only upon the judgment of a Court of Justice of competent jurisdiction, rendered in proceedings in which such person shall have had his rights fairly adjudicated, in accordance with the established rules of law applicable to such cases, and protected by all the safeguards of the Constitution. If the right of the attorney to practice law is "property," within the clear intent and meaning of the Constitution, then there is much force in the position that the statute, by depriving him of that right without a judicial investigation, such as is usual in cases of that kind, violates this provision. Still it is not so clear as to

be beyond doubt, for it can hardly be said that he is "deprived" of anything when the law leaves it open for him to resume his privileges at any time by taking the oath, a failure to do which is his own fault.

The right to practice law is not an absolute right, derived from the law of nature. It is the mere creature of the statute, and when the license is issued and the official oath taken, which authorizes the attorney to exercise the right, it confers but a statutory privilege, subject to the control of the Legislature. Such is the legal effect of all statutory privileges, unless they are in the nature of contracts or vested rights of property. (*The People v. Livingston*, 6 Wend. 531; *Oriental Bank v. Freeze*, 18 Maine, 109; 2 Story on Constitution, Sec. 1, 398; *Calder v. Bull*, 3 Dallas, 386, 394.) The question then arises, is this right to practice law in the nature of "property," or is it a "contract" between the Legislature and the attorney, which the former cannot impair within the true intent and meaning of the Constitution. As we have already shown, it does not rise to the dignity of a public office, and even if it did it could not be considered as a "contract" or a "vested right of property" within the Constitution. The Legislature possesses the power to alter or abridge the term of an office of purely legislative character (*People v. Haskell*, 5 Cal. 537); and even to destroy it entirely during the term of the incumbent (*Attorney-General v. Squires*, 14 Cal. 17); and can render the enjoyment of the right to an elective office dependent upon various conditions (*Brodie v. Campbell*, 17 Cal. 20). And the Legislature may increase or diminish the salary or fees of any officer, unless prohibited by the Constitution, without impairing any vested right. (2 Story on Constitution, Sec. 1, 385, note 4; *Commonwealth v. Bacon*, 6 S. & R. 322; *Conner v. City of New York*, 1 Selden, 285; *Butler v. Pennsylvania*, 10 How., U. S., 402; *Warner v. The People*, 2 Denio, 272.) Public officers have no proprietary interest in their offices, and their rights and duties may be changed by the Legislature during their continuance in office. (*State v. Dews*, R. M. Charlton, 397.) A law creating an office may be repealed before its term has expired, and the office and compensation ended thereby. (*People v. The Auditor*, 1 Scammon, 537.)

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The Legislature can limit the tenure and provide for the removal of an officer even when the office is created by the Constitution. (*Field v. The People*, 2 Scammon, 79.) Contracts between the State and individuals in public offices are not within the constitutional provision prohibiting the passage of a law impairing the obligation of contracts. (*Myers v. English*, 9 Cal. 341.) It is clear that as an officer of Court he has no vested right of property or contract within the meaning of the Constitution, nor has he in any other view that can be taken of his right. A right to an annuity granted by the Legislature may be taken away by a simple repeal of the law. (*Dale v. The Governor*, 3 Stewart, 387.) "Property is the right of any person to possess, use, enjoy, and dispose of a thing. The term, although frequently applied to the thing itself, in strictness means only the rights of the owner in relation to it." (*Wynehamer v. The People*, 3 Kernan, 433; 2 Bouvier's Law Dic., title Property.) An attorney may divest himself of his privileges at any time by applying to the Court to strike his name from the rolls. (*Scott v. Van Alstine*, 9 Johns. 216.)

The right is subject to the condition that the attorney shall possess a blameless moral character, and it is forfeited upon a breach of that condition. The public have a right to demand that no person shall be permitted to aid in the administration of justice whose character is tainted with dishonesty, corruption, crime, and, we will add, disloyalty or treasonable acts. And his name will be stricken from the roll by the Court, by a summary proceeding, in such cases, whether provided for by statute or not, as it is a duty which the Court owes to the public. (*Mill's Case*, 1 Manning, 392; *Peterson's Case*, 3 Paige, 510; *Austin's Case*, 5 Rawle, 204; *Burr's Case*, 1 Wheeler's Cr. C. 503; *Brown's Case*, 1 How., Miss., 303; *Rice v. Commonwealth*, 18 B. Monroe, 472.) And this is done not as a punishment of the attorney, but as a measure necessary for the protection of the public. (1 Manning, 392; 3 Paige, 510; 5 Rawle, 204.) And the Court has power to require the attorney to purge himself upon oath of the imputed charge. (*Attorney's License*, 1 Zabriskie, N. J., 345.) The name of an attorney who has fought a duel will thus be stricken from the roll, although no statute provided for such a case, and although the attorney had not been convicted of

the offense. (*Smith v. Tennessee*, 1 Yerger, 228.) A conviction of the crime charged is not necessary. (1 Zabriskie, N. J., 345.) The Legislature may deny to one man a privilege extended to another without infringing upon the Constitution. (*The People v. The Judge of the Twelfth District*, 17 Cal. 547.) The Legislature has power to repress whatever is hurtful to the general good, and to pass laws regulating the relations, contracts, intercourse, and business of the people at large, and of its members to each other, and it is generally the exclusive judge of what is or is not hurtful, the only limitations upon this power being those prescribed by the Constitution. It has the power to regulate as well as to suppress particular branches of business deemed by it immoral and prejudicial to the general good. The duty of Government comprehends the moral as well as the physical welfare of the State. (*Ex parte Andrews*, 18 Cal. 678.) The practice of the law is a privilege to which the Legislature may attach such conditions as it may deem proper, and a breach of the condition is a forfeiture of the right. (Collier, C. J., *Dorsey's Case*, 7 Porter, 395; *Dormenon's Case*, 1 Martin, 129; *Bank of New York v. Stryker*, 1 Wheeler's Crim. Cases, 330; *Sayer's Case*, 7 Cow. 367; Anon. 4 J. R. 191.)

The right to practice law is valuable to the possessor only. It cannot descend or be inherited, bought or sold, conveyed or transferred, can be divested and destroyed by a mere order of Court, is subject to forfeiture by mere loss of moral character on the part of the possessor, and cannot therefore, in any proper sense, be deemed "property," or amount to a "contract," in the constitutional meaning of those terms.

There is nothing in the act which deprives attorneys of the freedom of speech or publication, or inflicts any punishment for any abuse of those rights, within Sec. 9, Art. 1 of the Constitution. Nor is it opposed to "the spirit and policy of the Constitution," so often urged in the absence of an express prohibitory provision. That instrument, in its letter, as well as its "spirit and policy," is directly opposed to treason and treasonable practices; nor does it give the least support to the idea that Courts of Justice are to be lurking places or sanctuaries for that class of criminals. But we

do not wish to be understood as sanctioning the position that the Courts can declare a law void, which is not prohibited either by the express provisions of the Constitution, or by reasonable implication therefrom, upon any such vague and uncertain ground. This Court has said, in *People v. Weller* (11 Cal. 86), "We do not, however, approve of that principle of constitutional construction which seeks by vague surmises, or even probable conjecture, or general speculation of a policy not distinctly expressed, to control the express language of the instrument; since such a mode would not unfrequently change the instrument from what its framers made it, into what the Judges think it should have been." And these views are sustained by *Patterson v. Board of Supervisors of Yuba County* (13 Cal. 182); *Wynehamer v. The People* (3 Kernan, 431); *Cochran v. Van Surley* (20 Wend. 383).

We have already shown that the occupation of a lawyer is not an "office," and it follows that it does not come within the provisions of Sec. 18 of Art. 11, which require that laws shall be passed excluding from office those convicted of bribery, perjury, forgery, or other high crimes. But we do not wish to be understood as holding that the mention of a particular class of crimes in this section prohibits the Legislature from excluding from office any but those convicted of those particular crimes. That is a question not properly before us, and we do not deem it necessary to determine it.

We have carefully considered the constitutional objections to this law, and we see nothing in the Constitution of this State prohibiting the Legislature from requiring public officers, or those exercising special privileges, like attorneys at law, to take an expurgatory oath of the character of that prescribed by this act, and it is clearly within their general legislative powers, unless so prohibited. It is no answer to say that the power is liable to abuse, for that is an objection which lies to the use of every power.

It is objected that it virtually inflicts a punishment for a crime beyond the pardoning power of the Governor; but, as we have shown, the exclusion from the profession is not in the nature of a punishment. The statute substantially makes the refusal to take the oath operate as a voluntary withdrawal from the profession,

leaving it open for the attorney to be readmitted at any time by taking the oath, and thus complying with the new condition upon which the right depends. The pardoning power does not extend to the reinstatement of an attorney excluded from the practice by law or the order of a Court. The act is not retrospective, as it merely requires the party to swear that he has not committed any treasonable act *since* its passage. It does not relate to any act done *before* that time. It is not objectionable for uncertainty, because the first section prescribes two forms of oath, one for citizens, and the other for aliens. None but citizens are eligible to admission to practice law under the statute, and therefore the form for citizens is the only one applicable to attorneys. The idea that every person has a constitutional right to eligibility to office, unless convicted of crime, is a mere speculative theory, not founded upon any constitutional provision. If true, what right has the Legislature to exclude negroes from holding office? If it was intended to mean that all voters have the constitutional right to hold office, we find nothing in the Constitution to sustain any such position. But it is not necessary to investigate this question; for, as we have already shown, the practice of law is not an "office." The right of the Courts to exclude attorneys for loss of moral character, malpractice, or offenses not punishable as a crime, is established beyond all question, and it has never been claimed that such action was prohibited by the Constitution. The power of the Legislature to impose such conditions and qualifications upon the exercise of the privilege as they might deem proper, has been fully established. The possession of a "good moral character" has always been deemed an essential qualification for an attorney; and the Legislature might well deem a person who was unwilling to take the oath of allegiance as lacking in that necessary quality, and as unworthy of the high honors and the great privileges and responsibilities attached to the profession. The policy or impolicy of the law is not, however, a question for us to determine. That is a matter for the exclusive consideration of the law-making power. Our duty is simply to determine whether the power to pass the law exists.

The powers and privileges of a lawyer are extensive, and of great importance to the public interests. The Legislature and the

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Courts have always carefully guarded the profession against being degraded or corrupted, that it may command the confidence and respect of the public. The safety of the Government and the security of popular rights depend, in a great degree, upon the purity of the bench and the bar. If treason is allowed to find its advocates among their members, the very existence of the Government and the liberties of the people are endangered. It is therefore the solemn duty of the legislative authority to provide the necessary means to purge the profession of every taint or suspicion of treason. The Legislature of this State have attempted to perform that duty, by the passage of the act now under consideration, and it should be sustained by the Courts, unless they have clearly exceeded their constitutional powers. It is not open to that objection, as we have shown, and is therefore valid, and must be enforced accordingly.

It is insisted, however, that the payment of the United States revenue tax amounts to a license from the National Government to practice during the term for which the tax is paid. Sec. 67 of the United States Revenue Law of 1862, provides "that no license hereinbefore provided for, if granted, shall be construed to authorize the commencement or continuation of any trade, business, occupation, or employment therein mentioned, within any State or Territory of the United States, in which it is or shall be specially prohibited by the laws thereof, *or in violation of the laws of any State or Territory.*" This position is therefore untenable.

2. The next question is whether that portion of the act which relates to parties to actions is constitutional or not. Much that has already been stated respecting the law as it bears upon attorneys, applies equally to litigants; but there are some provisions of the Constitution which are claimed to release litigants from the duty of obeying it which are not applicable to attorneys. Thus it is urged that Sec. 1 of Art. 1, declaring that "all men have the inalienable right by nature of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing safety and happiness," is violated by this act, as litigants are prevented from protecting their lives, liberty, and property, by the aid of the Courts, and that it has the effect of taking the property of one man and

giving it to another, thus depriving the litigant of his property without due process of law. The great natural right to life, liberty, and property, is fully recognized by this section of the Constitution. These rights are guaranteed to all who do not infringe upon the rights of others, or forfeit them by crime. They are not in any way impaired by the act in question, for all persons have the same right to enjoy and defend their lives and liberties, and to acquire, possess, and protect their property, as before. Under this provision of the Constitution, the Legislature has no power to pass a law depriving A of his life, his liberty, or his property, or authorizing B to deprive him of them, or divesting A of his property and vesting it in B; nor has it attempted to do so by this act. These great rights are founded in the law of nature, but nature has provided no Courts in which contested claims can be litigated or admitted rights can be enforced. Hence arises one of the necessities of a Government, which is instituted for the very purpose of protecting and securing these natural rights, as is declared by Sec. 2 of Art. 1. The Government owes the duty of protection to the people in the enjoyment of their rights, and the people owe the correlative duty of obedience and support to the Government. The one is dependent upon the other. The Government cannot justly claim obedience when it refuses protection. The citizen cannot demand protection without he renders the equivalent of obedience and support. In other words, all persons owing allegiance to the Government, or residing within its jurisdiction, owe to it obedience, to its Constitution and laws, and aid and support against all who seek its destruction. When the citizen or resident refuses to render this obedience and support; when he aids, assists, countenances, or encourages those who are struggling to overthrow the Government, he no longer has a just claim to the aid of the Government to enforce his rights. He forfeits all right to the use of its Courts of Justice, and he has no just cause to complain if they are withdrawn from his use, for he has voluntarily broken the conditions upon which his right to demand their aid is founded.

There is nothing in the Constitution which prohibits the Legislature from closing the doors of the Courts against traitors and their aiders and abettors; or which requires that this shall not be done

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until after conviction of the crime, in a regular criminal trial; or that prohibits the Legislature from requiring of those litigating in the Courts that they shall purge themselves, by their own oath, of the imputed offense, before they shall claim their aid. The treasonable acts may be so extensively and secretly committed, that the ordinary course of a criminal trial would be entirely ineffectual to stay the evil. The litigant has no just right to complain, for it is his own voluntary or willful act that closes the doors against him. The law warned him what the result would be, and although it may be severe, it is a consequence of his own voluntary violation of the fundamental rights of society. The law may be a very efficient means of preventing the spread of treason and rebellion. It brings one of the consequences of treasonable conduct directly home to those who have something at stake—something to lose if the Government is overthrown—something to gain if it is sustained. Without it, traitors might recover, by the aid of the Courts, the very means to destroy the Government, by aiding and assisting the rebellion, and thus the Government would be furnishing the instruments to assist in its own destruction. The objection that it is treason against the United States, and not the State, that is made the ground for excluding the litigant, is not valid. We are one nation, one people, and the States are but parts of one whole; and whatever tends to destroy the nation affects equally each State. The National Government is supreme within its sphere, and this includes, among others, the exclusive power to declare war and make treaties—the greatest powers attached to the idea of sovereignty. In all these matters the States are but subordinate. When war exists it is against the nation, which includes every State; and therefore treason, in aiding those at war against the nation is equally treason against the State. But whether such be the legal technical effect, or whether all treason is not committed against the nation, which is the war-making, and thus, truly, the sovereign power, can make no material difference; for, as one State of the Union, California has the right to deny the use of her Courts to those who have committed, or intend to commit, treason against the nation, of which it forms a large component part, and which it is bound to sustain by all the means in its power.

It is also objected that it deprives a party of all remedy for the enforcement of his rights, and, therefore, impairs the obligation of contracts. We view it as imposing a new and further condition upon litigants, and not as a deprivation of all remedies. This condition is that the party shall, when required, make and file an affidavit that he has not and will not do an act, which, if done, would forfeit his right to the protection of the State. Our statutes have always imposed conditions upon those seeking the aid of the Courts. A stamp duty is imposed and also a tax for the Judge's salary fund. To procure an attachment, order of arrest, or an injunction, affidavits and bonds are required. In divorce suits the complaint must be verified, and in all these cases the proceedings and actions will be dismissed if the conditions are not complied with. Another long established condition is, that the suit must be brought within a certain time or it will be dismissed, and the cause of action deemed barred. The law under consideration merely requires the filing of an affidavit in certain cases, with the liability of having the suit dismissed and the cause of action barred if not complied with. All the remedies provided by law are open to him, and it is his own fault if he does not avail himself of them.

In our judgment it is a matter of State policy within the control of the Legislature. In Connecticut a law was passed declaring that no action shall be maintained for liquors sold, and it was held that an action on a note given in New York for liquors sold there could not be maintained, as it was against the policy of their laws, and that the law did not impair the obligation of contracts. (*Reynolds v. Geary*, 26 Conn. 179.) So of contracts tainted with usury; a law refusing all remedy to enforce them, or giving a remedy after it had been taken away, was held not to impair the obligation of contracts, even when it applied to past transactions. (*Baughner v. Nelson*, 9 Gill. 300). The Court says: "There can be no vested right to do wrong," citing *Satterlee v. Matthewson* (16 S. & R. 191): "In the nature of things there can be no vested right to violate a moral duty or to resist the performance of a moral obligation." We consider the same rule applies to political duties and obligations—that is, duties and obligations due to the Government.

An Act of Missouri was passed in 1847 suspending all actions against volunteers until the return home of the company to which they belonged. The Court said: "Parties where contracts have not been fulfilled according to their terms, and who are therefore compelled to resort to the judicial tribunals for their enforcement, must take the remedy given by law at the time, without regard to the remedy in force at the date of the contract." And it was held that the law did not impair the obligation of contracts. (*Edmunson v. Ferguson*, 11 Mo. 344.) The Legislature has the power to impose additional duties upon a party in order to preserve and secure his rights, and if he fails to comply with this duty it is a voluntary abandonment of his right. (*Turpley v. Hamer*, 9 S. & M. 310.)

The act in question relates entirely to the remedy, and it is well settled that the Legislature may vary the nature and extent, and prescribe the time and mode in which remedies must be pursued; and it is only when a statute takes away all means of enforcing the obligation of contracts, so that no redress remains, or so incumbers the remedy with conditions as to render it useless or impracticable to pursue it, that it can be held to violate this provision of the Constitution. (2 Story on Cons., Sec. 1385; *Bronson v. Kinzie*, 1 How. 311.) This is the rule properly deducible from the decisions upon this question, and it clearly recognizes the right to impose conditions upon remedies, and defines the extent of this right. In our judgment, this act does not so burden the remedy as to render it useless or impracticable, and it does not, therefore, violate this provision of the Constitution.

The statute has declared that a sentence of imprisonment in the State Prison suspends all civil rights of the party sentenced, during the term of imprisonment, and one sentenced for life is deemed civilly dead. (Wood's Dig. 353, Sec. 145.) Here all remedies are suspended or taken away, yet we are not aware that the constitutionality of such a law has ever been doubted. The requirement that a party suspected of disloyalty, one of the greatest of crimes, shall purge himself by oath of the imputed offense, before he is permitted to use the Courts to enforce his rights, is not unreasonable or burdensome. Difficulties and hardships have been sug-

gested about enforcing the law, as in an action by two plaintiffs one might take the oath and the others refuse, and cases of non-residents or foreigners who never heard of the law. We see no hardship in closing our Courts against foreigners, who may have built or fitted out ships to destroy our commerce under the rebel flag. But the case before us presents none of these questions, and we do not deem it necessary now to pass upon every supposable case that able counsel might suggest.

The questions involved in this case are novel and important, and we have given them a careful investigation, and our conclusion is that the act in question is constitutional and valid, and should be enforced accordingly.

The objection to the appearance of Mr. Highton, as attorney for the appellant, is sustained, and the judgment of the Court below is affirmed.

NORTON, J.—Sec. 3 of Art. 11 of the Constitution of this State requires that officers, before entering upon the duties of their office, shall take an oath that they will support the Constitution of the United States and the Constitution of this State, and provides that “no other oath, declaration, or test shall be required as a qualification for any office or public trust.” It is objected that the oath required by the Act of 1863, to be taken by attorneys at law, is a violation of this provision of the Constitution. I think the oath prescribed by the Act of 1863 is a different and “other oath” from that specified in the Constitution, certainly in that particular which requires the attorney to make oath that he has not, between the passage of the act and the taking of the oath, aided or encouraged, etc., the so-called Confederacy. The constitutional oath is strictly prospective, and only a pledge as to future conduct. Such provisions of a Constitution should be applied according to their direct and obvious meaning, and should not be extended to cases which can only be brought within their disqualification by doubtful construction. But I am satisfied, for the reasons given in the opinion of Justice Crocker, that an attorney at law is not a person holding an “office or public trust” within the obvious meaning of those terms as used in the Constitution, and that this objection is for that reason invalid.

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Various other provisions of the Constitution are appealed to for protection against the requirements of the Act of 1863, as well in regard to attorneys at law as to litigants, but none of which can, in my judgment, be made applicable except by a strained interpretation, not in accordance with their well-understood purpose and their settled meaning.

It is urged, that the requiring of oaths and tests as a condition upon which a citizen shall be allowed to pursue a calling, or to assert or defend his rights in Courts, is contrary to the spirit of free Governments and of our State Constitution, as evinced in the provision above quoted. If this be so, and if it might be reasonably claimed that the law in question was a violation of this policy, it is not a reason for a Court to pronounce a law of the Legislature void. A Court can only do this in case the law violates some distinct provision of the Constitution, and not upon the vague ground that it violates its spirit. I am unable to see that the law in question violates any such provision of the Constitution, and therefore agree that the attorney who has refused to take the required oath cannot be allowed to appear in the case, and that the judgment must be affirmed.

DAUBENSPECK *et al.* v. PLATT *et al.*

A MORTGAGOR may, in this State, maintain an action to redeem the mortgage. The plaintiff in an action to redeem a mortgage need not allege or prove a tender of the amount due upon the mortgage debt previous to the commencement of the action.

Where property is mortgaged by an unrecorded deed, absolute upon its face, accompanied by a separate defeasance, possession and actual occupation by the mortgagor is notice of his title to a purchaser from the mortgagee.

APPEAL from the Fifth Judicial District.

The facts are stated in the opinion of the Court.

Tod Robinson, for Appellants.

In a bill to redeem it is not necessary to allege a tender of the

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money due, nor is it necessary to prove a readiness or ability to pay at any time previous to the decree. (*Gordon v. Hobart*, 2 Sum. 401; *Gordon v. Lewis*, 2 Id. 143; *Upham v. Brook*, 2 Story, 623; *Smith v. Bailey*, 10 Ver. 163; *Perrine v. Dunn*, 4 Johns. Ch. 160; *Beekman v. Frost*, 18 Id. 560, 70; *Dunham v. Jackson*, 6 Wend. 22; *Waller v. Harris*, 7 Paige, 167; *Goldsmith v. Osborne*, 1 Ed. 560; *Turner v. Turner*, 3 Munf. 66; *Edgerton v. McRae*, 5 How. 183; *Butt v. Bondurant*, 7 Mon. 421; *Equity Draftsm. 60*; *Columbia Government v. Rothschild*, 1 Sim. 103; 2 Daniell's Chancery, 1205-1207; *Dorsey v. Borbee*, Lit. Sel. Cases, 204.)

H. P. Barber, for Respondents.

I. Under our system no bill to redeem will lie before foreclosure. Under the old doctrine of mortgages, where the mortgagee might maintain ejectment after condition broken, and obtain possession of the premises, (the mortgagee being considered as having the legal title) and where no limitation barred a mortgage, a party would necessarily be compelled to file a bill to redeem; for the mortgagee having the legal title and being in possession, the mortgagor possessed only an equitable right, to enforce which he must ask the assistance of a Court of Chancery. But as the mortgagor is now held to possess the legal title, and the mortgagee cannot enter without foreclosure and sale (*Practice Act*, Sec. 260), and four years bar the mortgage by limitation, *cui bono* a bill to redeem? If the mortgagee, or his assigns, be in possession wrongfully, ejectment will lie by the mortgagor. If rightfully, by consent of the mortgagor, payment or tender destroys that right, and makes further possession wrongful, and ejectment still lies. Nor can the mortgagor suffer; for the mortgagee's claim is barred in four years, whereas the mortgagor has five to bring his ejectment. The right to redeem is founded on an equitable title, whereas the mortgagor (until Sheriff's deed) has the legal title, and can enforce his rights by legal remedy. (*Johnson v. Sherman*, 15 Cal. 292; *Goodenow v. Ewer*, 16 Id. 456.) The decree on a bill to redeem under the old system, gave leave to redeem by payment within a certain time after forfeiture, which would be utterly useless under our system.

For if the decree ordered payment or final forfeiture, at any time before actual foreclosure, the defendant would still have his statute right of redemption within six months after sale, of which the Court could not deprive him; and if the decree fixed the time of payment beyond the time allowed by law for redemption, it would be a nullity, provided defendant had had his day in Court.

II. There is no allegation in the bill either of tender of the amount due, payment, or of any willingness or ability to pay. This is a *sine qua non* in a bill for redemption. (7 Dana, 300; 6 Gill & Johns. 18; 1 A. K. Marsh, 287; 4 Mon. 343; 1 Ed. Ch. 560.)

III. Plaintiffs allege in the bill payment of a portion, and that they have offered to pay Platt the residue. Both these facts are absolutely denied in the answer of Platt, and no proof thereof was offered by plaintiffs at the hearing. The plaintiffs made certain allegations of vital importance to their case in the bill, as follows: That their defeasance was not recorded through the fraud of Platt—that plaintiffs paid and discharged a portion of their alleged indebtedness to Platt—that plaintiffs had “offered” to pay him the balance due on the alleged mortgage—that Platt’s co-defendants took their deed from him fraudulently. These allegations were all specifically denied by the answer, and plaintiffs gave no evidence on the hearing in any manner sustaining the same. What could the Court do but to dismiss the bill, even so far as the merits were concerned?

IV. The co-defendants of Platt were *bona fide* purchasers for a valuable consideration without notice. The evidence falls far short of showing that they knew or even supposed the transaction was a mortgage; the evidence goes to show conclusively that they supposed it to have been a conditional sale.

V. If Platt’s co-defendants were entitled to a dismissal of the bill as against them, how could it possibly be retained as against Platt? By plaintiffs’ own laches in not recording their defeasance, Platt’s co-defendants had become *bona fide* purchasers for a valuable consideration without notice, and the legal title had vested in them without reserve. What then remained for plaintiffs to “redeem” from? The only remedy then left to plaintiffs would

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be at law against Platt, to recover damages in an action on the case.

VI. The bill is so multifarious and anomalous that the Court would dismiss it of its own motion. (3 How. 333 ; 5 Id. 132 ; 3 Hump. 640 ; 6 Munf. 20.)

NORTON, J. delivered the opinion of the Court—COPE, C. J. and CROCKER, J. concurring.

This is an action brought to redeem certain real estate from an alleged mortgage executed by the plaintiff to the defendant Platt, and to have a deed of the premises from Platt to the other defendants set aside and declared void.

The averments of the complaint, so far as they are material for this decision, are, in substance, that on the twenty-eighth day of October, 1861, the plaintiffs borrowed of Platt the sum of \$6,000, and as security for the repayment executed to him a deed of the premises, being a tract of three hundred and twenty acres, absolute on its face, and that at the same time, as a part of the transaction, a defeasance in the form of a separate agreement was executed between the parties, by which the plaintiffs agreed to pay to Platt \$6,000 and interest, on or before the first day of March, 1862, and he agreed to reconvey to them the premises on that day ; that the deed was recorded but the defeasance was not recorded ; that between the first and tenth days of March, 1862, the plaintiffs have paid to Platt the sum of \$4,570, by a transfer of a quantity of brandy and wine, the product of said premises, and since the tenth day of March, 1862, have offered to pay the balance due on said loan ; that at and ever since the making of said instruments the plaintiffs have been in the open and notorious possession of two hundred and twelve acres—part of said tract ; that on the tenth day of March, 1862, Platt conveyed the premises to the other defendants, and that at the time of such conveyance the grantees knew of the existence of the said agreement to reconvey. The complaint then prays that an account may be taken of the balance still due to Platt, and that the plaintiffs be allowed to redeem, and that upon payment the deed from them to Platt be annulled, and the deed from Platt to the other defendants

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be declared void, and asks for certain other special relief, and for such other or further relief as to equity and justice may appertain.

The answer of Platt denies that the transaction was a loan, but avers that it was a purchase, and states that the agreement to reconvey was made after the sale, and denies any payment by a transfer of any brandy or wine or otherwise, or any offer to pay, or tender of any sum of money pursuant to said contract of defeasance.

The other defendants deny any knowledge of the existence of said agreement of defeasance at the time of their purchase, and aver that they are *bona fide* purchasers for cash paid at the time of purchase.

The answer of Platt and the answer of the other defendants admit that the plaintiffs were living upon the premises at the time of the conveyance by Platt to the other defendants, Platt averring that they were occupying as his tenants, and the other defendants averring that they only resided on the premises, but that Platt conducted the business of the ranch, and that Platt at the time of his conveyance to them assured them that there would be no difficulty about the plaintiffs leaving.

The deed from the plaintiffs to Platt and the agreement of defeasance bear the same date, and the proof shows that they were prepared and executed at the same time, and the defeasance contains a positive agreement by the plaintiffs to pay the money. These circumstances establish that the transaction was a loan and that the deed and defeasance together constitute a mortgage.

On the trial, after the plaintiffs had closed their testimony, "the defendants moved the Court to dismiss the complaint as to Platt, because the plaintiffs had introduced no evidence to prove a tender or offer to pay to the defendant Platt the amount due to him in case the deed from the plaintiffs to him was a mortgage. And as to the other defendants, because there was no evidence whatever against them." This motion was granted. A motion for a new trial was denied, and from the order denying that motion and from the judgment entered in the action the plaintiffs appeal.

The dismissal of the complaint on the grounds stated was erroneous. Although it is common in a bill to redeem to state that an

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offer to pay has been made, this is not necessary. A bill to redeem does not proceed upon the ground that the complainant has an absolute right to a reconveyance or a cancellation of the mortgage, because the debt has been paid or extinguished by a tender, but it asks leave to pay it as still existing, and upon leave being granted the complainant usually is charged with the costs of the action. In case any payments have been made, either directly or from the rents of the mortgaged premises, it is usual to ask that an account be taken, and for leave to redeem by paying any balance that may be found due. (*Stapp v. Phelps*, 7 Dana, 300; *Goldsmith v. Osborne*, 1 Edw. Ch. 560.) And when the plaintiffs' proofs were closed they had made out a *prima facie* case against the other defendants. They had proved that the transaction was a loan, and that the deed from them to Platt, although absolute on its face, was, in consequence of the defeasance, only a mortgage. They then had a right to redeem as against Platt and as against any purchasers from Platt, unless they were *bona fide* purchasers for value without notice. It is not necessary to say whether, under the pleadings in this case, the burden of proof was on the defendants to show that they were such *bona fide* purchasers without notice; because the complaint averred that at the time of the conveyance from Platt to the other defendants, they, the plaintiffs, were in the open and notorious occupation of the premises; and, this averment is not only not denied, but the answer admits that they were residing upon the premises; and the fact of such residence was actually known to them, and was a subject of consideration between them and Platt at the time of their purchase. This was sufficient to put them upon inquiry, and to charge them with notice of the plaintiffs' rights. (*Pritchard v. Brown*, 4 N. H. 397; *Hunter v. Watson*, 12 Cal. 404.)

It is urged that an action to redeem does not lie in this State before foreclosure. There is no peculiarity in the laws of this State in reference to mortgages which takes from a mortgagor the right to redeem which exists in other States. Our statute provides that a mortgage shall not be deemed a conveyance so as to enable the holder to recover possession of the mortgaged premises without a foreclosure. This enables a mortgagor to hold the possession as

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owner until his title is divested by a foreclosure, but does not take from him the right to disincumber the land by a voluntary payment after a default to pay at the time provided in the mortgage. Although a redemption may not now be necessary after default in order to repurchase the legal title, it is still an important right in order to the full beneficial enjoyment of the property. Mortgages have long been treated as only liens, whether before or after default (*Dutton v. Warshauer*, 21 Cal. 609), and a bill to redeem has practically only been a proceeding to remove the incumbrance.

What may be the exact character or extent of the relief the plaintiff will be entitled to against Platt and the other defendants respectively, it is not necessary now to decide. They were all proper parties, and if there may be a question as to some part of the relief asked against the defendants other than Platt, we do not think the allegations in that behalf require this Court to sustain the judgment of dismissal upon the ground of misjoinder of causes of action after that question had been decided on the demurrer, and the defendants had answered over, and the case has been tried and decided on the merits.

Judgment reversed and cause remanded for further proceedings.

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ANY contract by a public officer which interferes with the unbiassed discharge of his duty to the public in the exercise of his office, is against public policy and void.

A postmaster is a public officer, and in the discharge of his trust is bound to exercise his judgment for the public benefit in fixing the location of his office, and any contract by which this exercise of his judgment is sold for his private emolument, interferes with the discharge of his official duties and is therefore void.

The question of the validity of a contract of a public officer does not depend upon the circumstance, whether it can be shown that the public has in fact suffered any detriment, but whether the contract is such in its nature as might have been injurious to the public interest.

The plaintiff in expectation of receiving a commission as postmaster entered into an agreement with defendants, whereby they leased to him certain premises for the term of one year, with the right on his part to extend the terms so

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long as he should remain postmaster not exceeding four years, in consideration of the sum of one dollar per year, and a covenant on his part, that as soon as he received his commission he would remove the post-office to the leased premises, and continue the same there for all the time that he should hold the office: *held*, that, in an action for the breach of this contract by defendant, it contravened public policy and was void.

If in order to secure a fit location for an office it should be necessary for a postmaster to agree to locate and continue it at a particular place, a contract to that effect might be valid, but to maintain an action thereon such necessity would be required to be affirmatively shown.

APPEAL from the Eleventh Judicial District.

The facts are stated in the opinion of the Court.

H. O. & W. H. Beatty, for Appellant, contended, that the contract sued on was against public policy and void, and cited: (*Parsons v. Thompson*, 1 Henry Blackstone, 322; 5 Holstead, 87; *Simon v. Chorpening*, 20 Cal. 182.)

S. W. Sanderson, for Respondent.

This contract violates no statute of this State nor any law of Congress. If then the contract is illegal, it must be because the respondent has agreed to do some act which is in violation of his duty, as postmaster, to the public. What duty, which the postmaster owes to the public, has the respondent by this contract agreed to violate or neglect? It is his duty to locate and conduct the office in such a manner as to conduce to the public convenience. He must locate it in a place reasonably safe, convenient, and accessible to the community who are to be accommodated at the office. But no where, in the record of this case, is it made to appear that the respondent did not perform all these duties.

The postmaster is bound to provide himself with an office, and if he is compelled to rent one, he contracts for it in his own name and upon his own credit, and not in the name of the Government or upon its faith and credit. The lessor looks to the postmaster for his pay, and has no claim whatever upon the Government. The postmaster contracts to pay and is bound to pay, and in the present instance has paid, the rent out of his own pocket. Such then being the case, what rule of law or principle of ethics debars us

from the right to exercise the brains, which God has given us, in making for ourselves the best contract we can. No rule of law or principle of ethics requires us to pay sixty dollars for that which is voluntarily offered to us for one, by persons who are neither drunk, nor insane, nor infants, nor married women. It cannot be said that the respondent was to be paid for doing his duty. His duty required him to provide a suitable and convenient office, and there his duty to the public—so far as the present question is concerned—ended. The terms upon which he provided the office, were a matter in which the public had no interest, and which concerned himself and his lessors only. Having performed his whole duty to the public, in the location of his office, he had the same right to look after his own interest in arranging the terms as any other provident and prudent man. But it has been said that the rent is allowed to us by the Government out of the proceeds of the office, and therefore if we win this case we are enabled to make a profitable speculation out of the transaction. Admit this, for the sake of the argument, and we ask, off from whom do we speculate? Certainly not the public, nor the Government, but the appellants. The respondent has made a contract in which neither the public nor the Government had any interest, or were in any manner affected thereby, much less prejudiced.

Chitty, in his work on Contracts (p. 575), speaking of contracts affecting public policy, says: "An agreement is not void on this ground, unless it expressly and unquestionably contravene public policy, and be manifestly injurious to the interests of the State." If then, it be doubtful whether an agreement is or is not against public policy, the Court must give the agreement the benefit of the doubt, and hold it valid.

In *Richardson v. Mellish* (2 Bingham, 242, 9 Eng. Com. Law, 563), Best, C. J. said: "On such grounds (public policy) we are not to presume corruption. Corruption is to be made out. * * * I am not much disposed to yield to arguments of public policy. I think the Courts of Westminster Hall, * * * have gone much further than they were warranted in going in questions of policy; they have taken on themselves, sometimes, to decide doubtful questions of policy. * * * I therefore say it is not a doubt-

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ful matter of policy that will decide this, or that will prevent the party from recovering; if once you bring it to that (doubt) the plaintiff is entitled to recover * * * .”

We have then—stating the case most favorably for the appellants—a contract supported by a strictly legal consideration, to wit, one dollar per annum, which the complaint avers was paid, and the answer does not deny the averment, and another consideration the legality of which is doubtful. Under the law then as declared by Chitty, and Best, C. J.—and they are uncontradicted by other authorities—the respondent has beyond all question a legal cause of action, and, other things permitting, ought to recover.

NORTON, J. delivered the opinion of the Court—COPE, C. J. and CROCKER, J. concurring.

This action is brought to recover damages claimed to have been sustained by the plaintiff, by reason of a breach of a covenant for quiet enjoyment contained in a lease executed by the defendants to the plaintiff. The action was tried by the Court without a jury, and upon the findings of fact a judgment was rendered for the plaintiff, from which the defendants appeal.

The facts in brief are these: The plaintiff, in expectation of receiving a commission as postmaster of Placerville, entered into an agreement with the defendants whereby they leased to him certain premises for the term of one year, with the right on his part to extend the term so long as he should remain postmaster, not exceeding four years, in consideration of the sum of one dollar per year, and his agreement to locate and continue the post-office on the premises so leased; and he on his part covenanted that as soon as he received his commission he would remove the post-office to the leased premises, and continue the same there for all the time he should hold the office of postmaster, and not remove the same during or within that time. He, in pursuance of the agreement, removed the post-office to the leased premises, but after a certain time they, by collusion and fraud, caused him to be evicted under a paramount title, to wit, by willfully refusing to pay the rent on a lease under which they held, and instigating their landlord to evict the tenants in consequence of such rent not being paid. The value

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of the rent or use of the premises was seven hundred and twenty dollars a year. The judgment was for \$1,058 40, being the amount of this value of the lease, less the sum of one dollar a year, from the time of eviction, on the seventeenth day of January, 1860, to the seventh day of October, 1861, at which time he ceased to be postmaster.

The defendants insist, among other things, that the contract on which the action is brought is against public policy and void. We think this defense is well taken.

It is not disputed but that contracts against public policy are illegal and void; but the plaintiff insists that the contract in question is not of that character.

“Public policy” is a vague expression, and few cases can arise in which its application may not be disputed. Mr. Story, in his work on Contracts (Sec. 546), says: “It has never been defined by the Courts, but has been left loose and free of definition, in the same manner as fraud. This rule may, however, be safely laid down, that wherever any contract conflicts with the morals of the time and contravenes any established interest of society, it is void, as being against public policy.” In illustration of this rule, he says (Sec. 576): “Where, therefore, a person occupying a public office agrees, for a reward, to exercise his official influence in questions affecting both public and private rights so as to bring about the private advantage of persons interested, the contract would be void. For every public officer is bound to be disinterested in the consideration of all public questions, and any contract which interferes with the free and unbiassed exercise of his judgment in relation to a question of trust or confidence reposed in him, is against public policy and good morals.” “Again (Sec. 577): Contracts for the sale of public offices come under this class of contracts in violation of public duty and are void. And this rule obtains upon the ground that they tend to destroy the responsibilities of the office, and to betray the interests of the public.” “So, also, the profits and emoluments of a public office of trust are not a good subject of sale. Thus it has been held, that the prize money of a sailor, or the full pay or half pay of an officer is not assignable at law, nor in equity, upon the ground that any salary paid for the

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performance of a public duty ought not to be perverted to other uses than those for which it was intended." These citations are made, not as referring to cases of the same exact character as the one before us, but as illustrating the general principle—which is, that any contract by a public officer which interferes with the unbiassed discharge of his duty to the public in the exercise of his office is against public policy, and is void.

The office of postmaster is a public office and is established for the benefit of the public. In the discharge of his duties the plaintiff was bound to locate the post-office and to continue it at a place suitable and reasonably convenient for the use of the public. In the discharge of this trust he was bound to exercise his judgment for the public benefit, and any contract by which this exercise of his judgment was sold for his private emolument, interfered with the proper discharge of his duties as a public officer. By this contract, in consideration of a gain to himself of seven hundred and nineteen dollars a year, he obligated himself to keep the post-office at a particular spot during the term of his office. He thus, for a consideration, contracted to conduct the business of his office, in one particular, in a stipulated manner. He was not free to exercise his judgment for the public benefit. However unsuitable the location might become he was under an obligation, if the contract is valid, not to change it.

It is said that this particular contract is not against public policy, because in fact the place selected was suitable and convenient for the public use. The question of the validity of the contract does not, however, depend upon the circumstance, whether it can be shown that the public has in fact suffered any detriment, but whether the contract is in its nature such as might have been injurious to the public, and which public policy requires should not be made by public officers in regard to the discharge of their duties. Upon this point the case of *Fuller v. Dame* (18 Pick. 472), is pertinent. In that case, it appears that Fuller was a stockholder in the Boston and Worcester Railroad Corporation, and for a consideration he agreed to use his influence in procuring that corporation to locate its depot at a particular place in Boston, it being expressed in the agreement that Fuller was of the opinion that the road ought,

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from a view to the public good and the good of the stockholders, to locate its depot at that place. The contract was held to be void on the ground that the road was established for the public accommodation, although a private corporation, and that the public had an interest in the question of the location of the depot, and that though the contract was not made to induce a party to do an unlawful act, it put him under an influence to do that which might injuriously affect the interests of the public, and the Court say: "Nor is it any satisfactory answer to say that when the agreement was entered into, he had come to the opinion that the location in question was the best for the interests of the public and for the interests of the corporation. That opinion might be changed by new views and new offers; and besides, the terms upon which this boon was to be obtained, was still an open question. But upon all these questions the influence of the promise of separate and distinct advantage deprived him of the power of exercising a free, disinterested, and unbiassed judgment."

It may be said that the benefits derived to a vicinity by the location of a post-office are an inseparable incident of the business of the office, and if a person owning property finds it for his interest and chooses, in order to secure the locating of the post-office in the vicinity of his property, to rent an office for a less sum than it might be rented for some other use, there is no wrong to the public in the postmaster availing himself of this incidental benefit to himself, just as on the contrary, if the locating of the post-office should be considered a detriment to the vicinity, he might be compelled to encounter the necessity of paying a higher rent than the office was worth for some other use. It may also be said that it might, in some cases, be necessary for the postmaster to engage to continue the office for a certain time in a particular locality in order to obtain a suitable office, by affording a compensation for changes in a building or in the business arrangements of the landlord. Undoubtedly these considerations must be estimated, in deciding whether any particular contract is against public policy, and in particular cases they may be sufficient to determine that a contract containing such a stipulation is not void, and there would have been more difficulty in saying that the present contract was void if it had been a simple

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lease for a definite term, though at a nominal rent. The postmaster would still have been at liberty to change the locality if the public interest required it, and in making such a contract the parties might take into consideration the probability of the post-office being continued at the selected location ; and this probability might, and doubtless would, depend upon the suitability of the location, and thus the public interest would not be affected. But in this case the postmaster, for a large consideration to himself, has sold the right of locating the post-office for an indefinite period, so long as he holds the office, reserving to himself no power to change it if the public interest should require it, and where no circumstance appears making it necessary to have made such a contract. We think it clear that public policy requires that a public officer should not bind himself as to the mode of discharging his duties by such a contract, under such circumstances ; that, by a just and reasonable application of the general rule, this contract is void, and that no facts or circumstances are shown to exist which would take the case out of the general rule.

The judgment is therefore reversed, and the Court below is directed to render a judgment for the defendants.

PARSONS v. FAIRBANKS *et al.*

On the twenty-second day of June, 1857, T. H. O. Walton sold a half interest in a ditch to G. W. Walton, who in part payment agreed, from the proceeds of said interest, to pay \$5,000 upon two promissory notes, executed by the grantor and one Hall to Parsons. February 12th, 1858, G. W. Walton sold and conveyed this interest in the ditch to G. V. Fairbanks for \$10,500, of which \$2,700 was paid at the time but not applied on the notes held by Parsons, and a mortgage given upon the half interest for the balance. Afterwards, G. V. Fairbanks sold to Jonathan Fairbanks, and soon after G. W. Walton gave to Parsons a written acknowledgment, that he had bought the interest in the ditch upon condition to pay \$5,000 of its proceeds upon the Walton and Hall notes, and that all moneys due to him upon his note to Fairbanks, were due and payable to Parsons until the \$5,000 should be paid. After receiving this acknowledgment Parsons transferred the Walton and Hall notes to Jonathan Fairbanks by indorsement, and took from the latter his note for \$5,000, secured by a new mortgage on the ditch: *held*, that any

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interest which Parsons acquired by the acknowledgment in the Walton mortgage he parted with by the transfer of his notes to Fairbanks; that the last note and mortgage could not be considered a renewal of the \$5,000 debt evidenced by the transferred notes; and, that the Walton mortgage was a lien upon the ditch for the balance of the debt secured thereby, over and above the amount of \$5,000, superior to any lien retained by Parsons thereon for the payment of the balance due him.

In the absence of fraud or mistake a party cannot escape the consequences of an arrangement voluntarily made by him, because of a misunderstanding of its legal effect.

APPEAL from the Tenth Judicial District.

The facts are stated in the opinion of the Court.

Z. Montgomery, for Appellant.

I. According to the written acknowledgment of G. W. Walton given to plaintiff on the twenty-fifth day of January, A.D. 1859, "all moneys due to him upon his contract of sale to G. V. Fairbanks, were due and payable to plaintiff, as trust money belonging to plaintiff, until the sum of \$5,000 should be paid. But, if all moneys due from G. V. Fairbanks to G. W. Walton belonged to plaintiffs until \$5,000 should be paid the mortgage held by G. W. Walton upon said ditch property, and which he seeks to foreclose in this action—being a mere incident to said debt—likewise belonged to plaintiff to the extent of \$5,000. Is there any question but that a Court of Equity after the execution of said written acknowledgment, and before the transaction between plaintiff and Jonathan Fairbanks, would have been authorized with all the parties before it in decreeing a foreclosure of G. W. Walton's mortgage for the benefit of plaintiff to the extent of \$5,000, and would not any interest which G. W. Walton had in that debt and mortgage have been subject to the superior rights of the plaintiff? "If a trust is created for the benefit of a party who is to be the ultimate receiver of the money, or other thing which constitutes the subject matter of the trust, he may sustain a suit in equity to have the money or other thing directly paid or delivered to himself, for in such a case he is entitled to dispose of it as the absolute owner." (2 Story's Equity Juris. and the authorities there cited; see, also, 1 Greenl. Cruise on Real Prop. 431, 433, 562; 3 American Chancery Digest, 425, 498, Secs. 498, 369.)

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II. The next question that arises is, did the taking of the note and mortgage by Parsons from Fairbanks, for the purpose of making the said \$5,000 payable directly to himself instead of having it pass through the hands of G. W. Walton, have the effect to postpone his lien to the lien of G. W. Walton, and thus to place plaintiff in a worse condition, and G. W. Walton in a better condition than before? This Court has repeatedly held substantially that the acceptance of a new mortgage, intended to supply the place of an old one and to secure the payment of the same debt, does not deprive the mortgagee of any rights which he had under the old mortgage, and that such a transaction does not in fact create a new incumbrance, but only changes the form of the old one. (See *Dillon v. Byrne*, 5 Cal. 455; *Birrell v. Schie*, 9 Id. 104; *Carr v. Caldwell*, 10 Id. 380; *Swift v. Kraemer et al.*, 13 Id. 526.)

Belcher & Belcher, for Respondent.

NORTON, J. delivered the opinion of the Court—COPE, C. J. and CROCKER, J. concurring.

On the twenty-second day of June, 1857, T. H. O. Walton sold an undivided half interest in the Oregon Creek Ditch to George W. Walton, who in part payment agreed from the proceeds of said interest to pay five thousand dollars upon two promissory notes, executed by T. H. O. Walton and Stanford Hall, to the plaintiff, Parsons. On the twelfth of February, 1858, G. W. Walton sold this interest in the ditch to G. V. Fairbanks for \$10,500 27, of which \$2,700 was paid at the time, and a mortgage given for the balance, of which three hundred and fifty dollars was paid subsequently. No part of these payments was applied on the Walton and Hall notes. Afterwards, G. V. Fairbanks sold this ditch property to Jonathan Fairbanks, but upon what terms does not appear. At this stage of the transactions G. W. Walton gave to Parsons a written acknowledgment and statement, that he had bought the interest in the ditch from T. H. O. Walton upon condition to pay \$5,000 of the proceeds of the property to Parsons on the Walton and Hall notes, and that all moneys due to him on his sale to Fairbanks were due and payable to Parsons, until said sum of \$5,000

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should be fully paid. The sale from G. W. Walton to G. V. Fairbanks was effected by a writing which is held to constitute a conveyance, and a mortgage back to secure the purchase money. On the first of June, 1859, after the giving of this acknowledgment, Parsons transferred the Walton and Hall notes to Jonathan Fairbanks and took from him his note for \$5,000, secured by a mortgage on the ditch.

This action is brought by Parsons to foreclose the mortgage given to him by Fairbanks. G. W. Walton is a party, and claims a prior lien by virtue of the mortgage executed to him by G. V. Fairbanks. The decree, in effect, adjudges that the Walton and Hall notes in the hands of Jonathan Fairbanks are a set-off to and a satisfaction of the mortgage held by G. W. Walton to the extent of \$5,000, and that the balance of his mortgage has priority over the mortgage of Parsons. From this decree Parsons appeals.

The mortgage of Walton being of prior date to that of Parsons, the decree is of course correct so far as it rests upon these two instruments alone. But Parsons claims that by virtue of the acknowledgment in writing made to him by Walton, founded upon or in consequence of the agreement existing between G. W. Walton and T. H. O. Walton, that the former should pay \$5,000 on the Walton and Hall notes held by Parsons, he became an assignee to the amount of \$5,000 of the mortgage executed by G. V. Fairbanks to G. W. Walton, and that the note and mortgage executed to him by Jonathan Fairbanks was a mere renewal in his favor of the debt of \$5,000 evidenced by the Walton and Hall notes and mortgage lien. On the contrary Walton claims, in effect, that the written acknowledgment given by him to Parsons did not constitute any transfer of his mortgage or any legal obligation upon him, and that if it could be considered as such a transfer, it was only as a security for the payment of the Walton and Hall notes to the extent of \$5,000, and that when Parsons took the note and mortgage of Jonathan Fairbanks, and transferred to him the Walton and Hall notes, he voluntarily parted with his claim on the security of the Walton mortgage, and took in its stead the security of the note and mortgage of Jonathan Fairbanks of a subsequent date.

We do not find it necessary to decide whether the transactions

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above detailed conferred any legal claim upon Parsons to an interest in the Walton mortgage, as security for the Walton and Hall notes, because, conceding that it did, it appears clear that he parted with all such interest when he transferred the notes to Jonathan Fairbanks. There is a dispute between these parties as to whether the notes for their full amount were transferred by Parsons to Jonathan Fairbanks, or whether they were treated as paid by Fairbanks to the extent of \$5,000, and only a balance of about eight hundred dollars transferred. Without deciding that this difference is material, we observe that the proof shows that the notes were transferred simply by an indorsement without recourse, and it does not appear that any payment was indorsed on them; and Parsons, in his replication to Walton's answer, speaks of the notes as having been transferred to Jonathan Fairbanks, and held by him to the extent of the \$5,000 as an offset to so much due to Walton on his mortgage. What the witness says, as to its being understood that only a balance after deducting \$5,000 was due on the notes, cannot avail as against the written terms of the transfer, and the admission in the replication.

If Jonathan Fairbanks was the debtor, who was bound to pay the Walton and Hall notes, there would be more reason for the claim of Parsons, that the note and mortgage executed to him by Jonathan Fairbanks was a mere renewal of the Walton and Hall debt; but G. V. Fairbanks was the party indebted to G. W. Walton, and whose indebtedness, if any thing, to the extent of \$5,000, was assigned to Parsons. It may be conjectured, that there was some understanding between G. V. and Jonathan Fairbanks, that the latter was to pay the debt of the former incurred for the purchase of the ditch property; but there is no evidence of this, and there is no reason to claim that Parsons had been invested with any demand which G. V. Fairbanks might have had upon Jonathan Fairbanks. By the transaction of June 1st, 1859, Parsons acquired not only a direct mortgage to himself upon the ditch property, but also the personal responsibility of Jonathan Fairbanks, to which before then he had no claim; and Jonathan Fairbanks, in return, acquired the personal liability to himself of Walton and Hall on their notes, together with whatever equities attached to those notes,

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to be paid out of the proceeds of the obligation and mortgage execution by G. V. Fairbanks to G. W. Walton. Parsons complains that under this view, he is placed in a worse condition by the transaction of June 1st, 1859, than he was in before. There are two answers to this. One is, that if that arrangement was voluntarily made by him, without fraud or mistake of fact, he cannot escape the consequences, although he may have misunderstood what would be the legal effect. The other is, that he received a new consideration, to wit: the personal liability of Jonathan Fairbanks; and it therefore does not appear but that his condition is better. In this view, it is only the case, not uncommon, of a person holding a first mortgage surrendering it, and for a valuable consideration, taking a second mortgage.

Whether there was, under the facts, a binding assignment by G. W. Walton of an interest in the mortgage executed to him by T. H. O. Walton, and hence, whether that mortgage was properly treated as having been satisfied, or offset to the extent of \$5,000 by the Walton and Hall notes, we are not called upon to decide—because G. W. Walton does not appeal from the decree. We think the decree is correct so far as it affects the rights of Parsons, the only appellant.

The judgment is affirmed.

PEOPLE v. SYMONDS.

UPON a challenge to a juror, in a capital case, for implied bias, he stated that he had formed an opinion as to the guilt or innocence of the defendant, but that it was not an unqualified opinion, and was rather in the nature of an impression than any fixed conclusion: *held*, that the challenge was properly overruled.

The mere fact that the jury in a criminal case separate without permission of the Court, does not require that a new trial should be granted. The presumption that the jury may have been subject to improper influences which attaches to the fact of such separation may be removed by an affirmative showing that no injury to the defendant resulted therefrom.

A new trial will not be granted because some of the jurymen, in a criminal case, may have conversed with third persons while deliberating upon their verdict, if it be shown that such conversations were innocent.

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Upon trial under an indictment for murder, it is no ground of objection to a witness being sworn and examined for the prosecution, that his name was not indorsed upon the indictment.

The objection, that the names of the witnesses examined before the grand jury are not indorsed upon the indictment, can only be made available to the defendant by a motion to set the indictment aside.

On application by a defendant to postpone a trial, on the ground of surprise, at the introduction of a witness whose name is not indorsed upon the indictment, must, when made, be supported by an affidavit or other evidence or suggestion showing the surprise, in the absence of which it should be denied.

APPEAL from the Sixth Judicial District.

The facts are stated in the opinion of the Court.

J. W. Coffroth and Geo. R. Moore, for Appellant.

I. The examination of the juror Tutt, showed that he was wholly incompetent to act in the case, and the challenge should have been sustained.

The defendant was certainly entitled to a fair and impartial trial, and this he could not have, unless he had an unprejudiced jury to try the charges against him. A juror who had made up his mind could not be considered impartial.

In the case of *The People v. Reyes* (5 Cal. 349) this question arose and was very fully considered by the Court. The Court said: "Wherever the right of trial by jury exists, the law, in all cases contemplates that each and every person who sits in a cause, shall have a mind utterly free from all bias or prejudice, of any kind whatever. If the juror is prejudiced in any manner, he is not a fit person to sit in the box."

In the case of *The People v. Gehr* (8 Cal. 361) the Court said: "A challenge for cause is warranted, when the juror on his *voir dire* states that it would require proof to change the opinion then existing in his mind. The fact that the juror further said that he could try the cause impartially was entitled to no consideration; few men will admit that they have not sufficient regard for truth and justice to act impartially in any matter, however much they may feel in regard to it, and every day's experience teaches us that no reliance is to be placed on such a declaration."

II. The jury was allowed to separate without the permission of the Court.

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About this point there can be no controversy. It is distinctly proved by the affidavits. As this question has been several times considered by this Court, and lately, very fully, in the case of *The People v. Brannigan*, we do not propose to make any argument to sustain it. The facts upon this point so clearly shown by the affidavits referred to, when squared by the law laid down in the *Brannigan* case, settle this point beyond a doubt.

III. Sec. 232 of the Criminal Practice Act (Wood's Digest, 288) requires the names of all the witnesses who are to be examined on the trial, for the prosecution, to be indorsed upon the indictment.

This law is intended for the protection of the defendant. If the names of all the witnesses for the State are upon the indictment, the defendant has an opportunity of knowing what he has to meet. If the witnesses are not truthful, he can take the necessary steps to impeach them; but if they are forced upon him, without a moment's notice, he has no opportunity of showing their character, or rebutting or contradicting their testimony. If the Court was justified in overruling the defendant's objection to the witness testifying, it most certainly should have granted a continuance, on the defendant's motion and on his affidavit of surprise.

In the case of *The People v. Freeland* (6 Cal. 98) the Court said: "I understand the rule to be, that any witness may be introduced upon the trial by consent of the Court, notwithstanding he was not before the grand jury, subject only to the right of the prisoner to a postponement, in case such evidence should operate as a surprise upon him." This application is within the rule as thus stated.

Thos. H. Williams, for Respondent.

NORTON, J. delivered the opinion of the Court—COPE, C. J. and CROCKER, J. concurring.

The defendant was convicted of the crime of murder in the first degree, from which judgment he has appealed, and assigns three causes of error:

1st. Error in denying the defendant's challenge for cause to the juror John A. Tutt.

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The ground of this challenge, though not specifically stated in the challenge, is claimed to be implied bias, as shown by the answers of the juror when questioned. After the juror had stated that he did not remember to have read the proceedings on a former trial, though he might have read a portion, that he had not conversed with the witnesses, but had with outsiders, the questions and answers are as follows: Question—Have you an opinion as to the guilt or innocence of the defendant? Answer—I have. Q.—Is that a fixed, unalterable opinion? A.—No, sir; it is not. Q.—Would it require testimony to remove the opinion you now have? A.—I do not know how to answer the question; that is, of course, without any evidence at all I would consider him innocent; in the impression I have yet upon my mind, I do not know that it would. It might, though. I hardly know how to answer the question. Q.—Is the opinion you have an unqualified opinion? A.—No, sir; it is more an impression with me than an opinion. I do not remember the evidence in the case.

The statute requires that an opinion which shall constitute implied bias shall be "an unqualified opinion or belief that the prisoner is guilty or not guilty of the offense charged." The difference between an opinion and an unqualified opinion or belief is not very broad, and sometimes not recognized by a juror. It is very proper by other questions to ascertain whether in fact the opinion is an unqualified one or is dependent upon the truth of facts or rumors which the juror may have heard, or whether it is merely an impression. In the case of the *People v. Reynolds* (16 Cal. 128), the Court say: "The effect upon his mind must be more than an impression; it must amount to a conviction in order to exclude him for implied bias." "The shades of distinction between opinion and impression may not always be easily discriminated, even by the juror himself; but the statute has drawn the distinction, and in a great majority of instances the juror may be made to comprehend it." In the present case, after the juror had stated that he had formed an opinion but that it was not a fixed, unalterable opinion, questions were put to him for the purpose of ascertaining more clearly the character of this opinion, after which the juror says it is not an unqualified opinion, that it is more an impression than an

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opinion. The result of the juror's statement therefore is, that he had not formed an unqualified opinion, but only an impression as to the guilt or innocence of the prisoner, and if the condition of this juror's mind should be judged from his whole answers, without reference to the exact test prescribed by the statute, it is clear that it was unbiased and free to try the prisoner upon the evidence that should be adduced. There was, therefore, no error in the ruling of the Court upon this point.

2d. Error in overruling motion for a new trial, made upon the ground that the jury were allowed to separate without the permission of the Court.

The mere fact that a jury thus separate is not a reason for granting a new trial. The fact that jurors have been so situated that they may have been tampered with is the reason why such a separation unexplained is held a sufficient ground for setting aside their verdict. Accordingly, in the case of the *People v. Brannigan* (21 Cal. 337), this Court decided, that when the accused proved the fact of a separation under such circumstances as that the jury might have been tampered with, he was not required to show that in fact they were so tampered with, but was entitled to a new trial in the absence of any proof explaining the separation or showing that no injury to the accused resulted from it. The opinion, however, distinctly indicates that if such explanatory proof had been made, the mere fact of separation would not have occasioned a new trial. In the case before us the evidence of the separation is contained in the affidavits of two persons, O'Connor and Penny. It is questionable whether the facts stated by the former show a separation. His statement is that he saw the jury walking on the platform of the St. George Hotel, and that a portion of said jurors were separate and apart from the others of said jurors. The same thing might be said of them if they had been confined in a room by themselves. Penny says he saw the jury separate and apart, and without the keeping of the Sheriff. This, too, is equivocal, and rather means that the Sheriff had left the jury together and absented himself, than that the jurors had separated one from another. He, however, states that one of the jurors came by himself to the store in which the witness was engaged and had a conversation with him. This

shows a separation and only leaves a question whether the accused by presenting an affidavit, stating what took place in part, to wit, that the witness had a conversation with the juror, but not stating the character of the conversation, does not impliedly admit that the conversation was harmless and that the separation caused him no injury. But it is not necessary to consider critically the effect of these affidavits as it might have been if they had stood alone, because the prosecution assumed the burden of showing that no injury resulted to the accused, from the facts set forth in the affidavits. The testimony of the juror who had the conversation with Penny is that he was taken sick and went to a water closet, and in returning passed through the store where Penny was and had a few words of conversation with Penny's employer, and perhaps with him, but it was of an entirely innocent character. The testimony of Penny, and also that of the Sheriff, who had the jury in charge, and that of several of the jurors, was produced by the prosecution. It is voluminous, and it is unnecessary here to recapitulate it. It is sufficient to say that it shows fully that the jury were not subjected to any improper influences and that the accused suffered no injury from the separation.

Connected with this point in the motion for a new trial is an allegation that the jury were allowed to converse with various persons. This irregularity is not urged in the brief on which the case is submitted, and doubtless for the reason that the explanatory evidence produced by the prosecution shows that it was harmless. In this respect the case is within the rule stated in the case of the *People v. Boggs* (20 Cal. 432).

From these considerations it appears that there was no error in the ruling of the Court upon the second point.

3d. Error in allowing a witness to testify whose name was not inserted at the foot of, or indorsed on, the indictment; and also in overruling the defendant's motion for a continuance, on the ground of surprise.

Where the names of the witnesses examined before the grand jury are not inserted at the foot of the indictment, or indorsed thereon, the indictment may be set aside on the defendant's motion. If this motion is not made, the defendant is precluded from after-

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wards taking the objection. (Act to regulate Proceedings in Criminal Cases, Secs. 277, 278, 280–282.) In the case of the *People v. Freeland* (6 Cal. 96), it was decided that this objection was unavailable when taken in a subsequent stage of the case. The case of the *People v. Lawrence* (21 Cal. 368), is to the same effect. It is not an objection to the witness being sworn on the trial.

In the case of the *People v. Freeland* it is said that such a witness may be introduced, subject only to the right of the prisoner to a postponement in case such evidence should operate as a surprise upon him. This remark was not necessary to the decision of that case, as it does not appear that there was any motion made for a postponement. But whatever may be its authority, it does not decide that a postponement in such a case is a matter of right upon the mere allegation of surprise. If that were so, then the objection that the name did not appear on the indictment could be made at a time subsequent to the time for making a motion to set aside the indictment, notwithstanding the provisions of Sec. 280, above cited. In such case, as on any other motion for a postponement on the ground of surprise, it cannot be error to refuse the motion if no affidavit or other evidence is given, or reason suggested, to satisfy the Court that the defendant is in fact surprised by the evidence. In this case no affidavit or other evidence was introduced when the motion was made. An affidavit of the defendant that he was surprised by the decision of the Court in admitting the testimony and in denying the motion for a postponement, was filed when the motion for a new trial was made. But this cannot be made available to show that the Court erred in denying the motion for a postponement upon the facts and evidence before it at the time the ruling was made.

There was, therefore, no error in the ruling of the Court upon the third point.

Upon a review of the whole case we find no error or irregularity which entitles the defendant to a new trial.

The judgment is affirmed and the Court below is directed to fix a time for carrying it into execution.

On petition for rehearing, NORTON, J. delivered the following opinion—the other Justices concurring:

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A petition for a rehearing is made in this case on two grounds.

1st. That the Court in its opinion did not speak of the affidavit of C. H. George in considering the point as to the separation of the jury, and the petition asserts that he testified to something material which was not stated in the affidavits of the other two witnesses.

The affidavit of George was not specified because in it he not only stated nothing material which was not stated in the other affidavits, but in fact did not say that the jury were separated, or that any of them were at any time separate or apart from the others, which fact was directly stated in the other affidavits. The Court considered all the affidavits, and particularly specified those which contained not only everything material for the prisoner which was in the affidavit of George, but also some expressions in addition which had a more direct reference to the point raised.

This witness George was produced and examined on the motion for a new trial in regard to his affidavit and the facts it specified. Also, eleven of the twelve jurors were examined, as well as the two Sheriff's officers who had charge of the jury, and two other persons, to wit, Penny and Bidleman. The testimony of all these persons concurs in showing that no injury resulted to the prisoner from the facts alluded to in the affidavits.

2d. That the Court, in speaking of the application for a continuance on the ground of surprise by the introduction of the witness R. Snap, stated that no affidavit or other evidence of surprise was introduced when the motion was made, and the petition says that it appears by the record that the prisoner's counsel offered to make an affidavit if time was given to prepare it, when the prosecution considered the affidavit made, and to be filed as of that date.

We do not find anything to this effect in the record. On the contrary, in the minutes of the proceedings on the motion for a new trial, the Court is stated to have said, in speaking of the motion for a continuance: "It was for them to show the fact that they were taken by surprise; they did not make the showing and I overruled it."

It also appears by the testimony of the Clerk of the Court that no affidavit was filed when the motion for a continuance was made, and that there is none on file. The only affidavit which can be

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considered as applying to the matter in any way, and which is the one referred to in the petition for rehearing, is the one made by the prisoner some days after the trial, and which was used on the motion for a new trial. The effect of this affidavit we considered in our former opinion. It may be further said in regard to the testimony of the witness Snap, that it appears that this was a second trial, and that the same witness was examined on the former trial, and the prisoner therefore must have been informed of the testimony he could give, and that he would probably be again called on the second trial.

Rehearing denied.

A. M. GILMAN & CO. v. COSGROVE.

A COMPLAINT which contains no other designation of the party plaintiff than the name of a copartnership firm is defective; but such defect can only be made available to defendant by demurrer for defect of parties, or by denial in the answer of any cause of action and objection thereunder to evidence in support of the claim.

An amended answer supersedes the original and destroys its effects as a pleading.

APPEAL from the Seventh Judicial District.

The complaint is entitled "*A. M. Gilman & Co. v. James N. Cosgrove*," and contains no other description or designation of the parties plaintiff, but states a cause of action for goods sold and delivered in favor of the "plaintiff above named." The first answer of defendant consisted of a general denial with plea of accord and satisfaction and statute of limitations. An answer termed an "amended and supplemental" answer was afterwards filed containing no denial, but setting up the giving of promissory notes in full payment and satisfaction. The case was tried by a referee and on the trial, defendant objected to the introduction of any evidence by plaintiff, on the ground that there was no sufficient designation of the party plaintiff in the complaint—objection overruled and defendant excepted. The defendant also offered evidence to disprove the sale and delivery of the goods, which on objection of plaintiff was excluded, upon the ground that the second answer

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raised no issue upon that point, to which ruling defendant excepted. After this ruling was made, and several witnesses having been examined, the defendant moved for leave to file an amended answer upon an affidavit, that he had not, through the fault of plaintiff, been able to obtain access to the papers and accounts necessary to enable him to understand and state his defense. Plaintiff filed in opposition to the motion an affidavit, showing that the accounts and papers referred to were long before the trial submitted to defendant's inspection. The motion was denied, and defendant excepted. The referee reported a judgment in favor of plaintiff for the amount claimed, and judgment accordingly was rendered by the Court, from which the defendant appeals.

Wallace & Rayle, for Appellant.

Henry Edgerton, for Respondent.

NORTON, J. delivered the opinion of the Court—COPE, C. J. and CROCKER, J. concurring.

1. The complaint should have set forth the names of the individuals composing the firm of A. M. Gilman & Co., as the plaintiffs, if the action was intended to be in behalf of individuals composing a firm. Defendants may, by virtue of a special statute, be sued by their copartnership name, but there is no statute authorizing an action to be brought by plaintiffs in a copartnership or firm name. The objection to this defect has, however, not been taken in a way to be available. If it may be assumed that "A. M. Gilman & Co." is the name of a firm of which A. M. Gilman is one of the partners, then the defendant should have demurred to the complaint for a defect of parties. If it be said that it does not appear by any averment in the complaint, and that it cannot be assumed that "A. M. Gilman & Co." is the name of a copartnership, then, in order to have made it appear that there was an error in naming the plaintiffs, and to have taken effectual advantage of that error, the answer should have denied the purchase of any goods of the plaintiffs, and when proof was offered, it should have been shown that the goods were bought of certain individuals, who, perhaps, might have done business under a firm name, but neither of whose names

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was A. M. Gilman & Co. (*Porter v. Cresson*, 10 Serg. & Rawle, 257; *Pate v. Bacon*, 6 Munf. 219.) The objection not having been taken in a proper mode, there was no error committed on this point.

2. The second answer filed is called an amended and supplemental answer, and such it is in form and substance. It is not a supplemental answer alone, if such an answer could properly be filed as a mere addition to the one already filed. There was therefore no error in holding that it suspended the first answer.

3. As the answer which was held to be the one on which the issue was formed and the trial was had, did not deny the allegation of the complaint as to the sale of the goods and the amount due therefor, the evidence offered upon those points was properly rejected.

4. The grounds upon which the defendant asked leave to file a second amended answer were displaced by the counter affidavit, and there was hence no abuse of discretion in denying the application. We do not by this remark intend to be understood that it would otherwise in this case, or in any case, be an abuse of discretion to refuse leave to amend, after proofs had been introduced on a trial.

Judgment affirmed.

POWELSON v. POWELSON.

CRUELTY as the ground of a divorce, is such conduct in one of the married parties as renders further cohabitation dangerous to the physical safety of the other, or creates in the other such reasonable apprehensions of bodily harm as naturally interferes with the discharge of marital duty.

Any conduct sufficiently aggravated to produce ill-health, or bodily pain, though operating primarily upon the mind only, is legal cruelty.

Where it appeared that the defendant was in the habit of using towards the plaintiff, his wife, vile and abusive language, falsely charging her with adulterous intercourse—that she was a weak, nervous woman, modest in her deportment, and amiable in her disposition—and that the conduct of the defendant caused her much mental suffering, producing fits of illness, and threatening permanent injury to her health: *held*, that plaintiff was entitled to a divorce on the ground of extreme cruelty.

APPEAL from the Sixth Judicial District.

The facts appear in the opinion.

George Cadwallader, for Appellant.

"Cruelty is such conduct in one of the married parties as renders further cohabitation dangerous to the physical safety of the other, or creates in the other such reasonable apprehension of bodily harm as naturally interferes with the discharge of marital duty." (Bishop on Mar. and Div. Sec. 454.)

In *Rice v. Rice* (6 Ind. 100), the Supreme Court of that State, reviewing an instruction (refused by the Court below) to the effect that a mere charge of adultery did not constitute cruelty, said: "We may remark of that instruction, that it seems to contemplate an entirely physical, sensual view of the married relation, and if that relation has no aim to the social happiness and mutual enjoyments of those united in it, the instruction should have been given; but if it is otherwise—if it be true that we are possessed of social, moral, and intellectual natures, with wants to be supplied, with susceptibilities of pain and pleasure; if they can be wounded and healed as well as the physical part, with accompanying suffering and delight—then, we think, that conduct which produces perpetual social sorrow, although physical food be not withheld, may be well classed as cruel, and entitle the sufferer to relief." In *Lewis v. Lewis* (5 Missouri, 278), the Supreme Court said: "Petitioner for divorce charged that her husband had offered her such personal indignities as rendered her condition intolerable: *held*, that charges of infidelity made by the husband, without any just cause, were such personal indignities as the statute contemplated, and good ground for a divorce." The charge of adulterous intercourse against the wife, if groundless, is undoubtedly an act of gross cruelty, said the Supreme Court, in the case of *Pinkard v. Pinkard* (14 Texas, 365). In *Elmes v. Elmes* (9 Barr, Penn. 166), the Court observed: "To render the condition of a wife intolerable and her life burdensome, it is not necessary that there should be blows or cruel and barbarous infliction of batteries that endanger her life. There

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may, without that, be such indignities to her person, as to render her life a burden."

(See also *Patterson v. Patterson*, 12 English Law Equity, 19; *Butler v. Butler*, 1 Parsons, 329; *Evans v. Evans*, 1 Hag. Con. 35; *Collett v. Collett*, 1 Curt. Ecc. 678; 2 Hawks, 189; *Mogg v. Mogg*, 2 Add. Ecc. 292; *Cloburn's Case*, Hetley, 149.)

Coffroth & Spaulding, for Respondents.

COPE, C. J. delivered the opinion of the Court—NORTON, J. and CROCKER, J. concurring.

We think the Court below erred in refusing the prayer of the plaintiff for a divorce. The ground of complaint is cruel treatment on the part of the husband, and if any treatment short of physical violence can amount to legal cruelty, we regard the case as fully made out. It appears that the defendant was in the habit of using toward the plaintiff the vilest and most abusive language, falsely charging her with adulterous intercourse; that she is a weak, nervous woman, modest in her deportment, and amiable in her disposition; that the conduct of the defendant caused her much mental suffering, producing fits of illness, and threatening permanent injury to her health, rendering a separation from him necessary.

Cruelty, as defined by Bishop, is such conduct in one of the married parties as renders further cohabitation dangerous to the physical safety of the other, or creates in the other such reasonable apprehension of bodily harm as naturally interferes with the discharge of marital duty. (Bishop on Marriage and Divorce, Sec. 454.) This definition falls strictly within the doctrine of the cases, and in *Morris v. Morris* (14 Cal. 76), we adopted it as expressing substantially the meaning of our statute. It seems to be settled, that in order to justify a divorce the harm to be avoided must be bodily harm, and not merely mental, and some of the authorities go so far as to hold that mental suffering, though affecting the health and endangering the physical safety, is not sufficient. The better opinion, however, is opposed to this view, and we think that any conduct sufficiently aggravated to produce ill-health or bodily pain, though operating primarily upon the mind only, should be re-

garded as legal cruelty. "Suppose," says Bishop, "the body is the only thing to be considered in these cases, yet, if we find various avenues to it, through any one of which may run the waters to drown its life or its health, surely we cannot say that the approaches through one avenue shall be left open by the law, while the others are closed." (Sec. 468.)

We shall not attempt a review of the authorities, but will refer to the case of *Butler v. Butler* (1 Parsons, 329), in which the subject is discussed with learning and ability. After an elaborate examination of the cases, the Court say: "A husband may, by a course of humiliating insults and annoyances, practiced in the various forms which ingenious malice could readily devise, eventually destroy the life or health of his wife, although such conduct may be unaccompanied by violence, positive or threatened. Would the wife have no remedy, in such circumstances, under our divorce laws, because actual or threatened personal violence formed no element in such cruelty? The answer to this question seems free from difficulty, when the subject is considered with reference to the principles on which the divorce for cruelty is predicated. The Courts intervene to dissolve the marriage bond, under this head, for the conservation of the life or health of the wife, endangered by the treatment of the husband. The cruelty is judged from its effects, not solely from the means by which those effects are produced. To hold absolutely that if a husband avoids positive or threatened personal violence, the wife has no legal protection against any means, short of these, which he may resort to, and which may destroy her life or health, is to invite such a system of infliction by the immunity given the wrongdoer. The more rational application of the doctrine of cruelty is, to consider a course of marital unkindness with reference to the effect it must necessarily produce on the life or health of the wife; and, if it has been such as to affect or injure either, to regard it as true legal cruelty."

These views, the justice and humanity of which must be apparent to all, we regard as a sound exposition of the law; and we have only to say, in conclusion, that we consider the evidence in this case as bringing it within the principle laid down.

The judgment is reversed, and the cause remanded for a new trial.

Gagliardo v. Crippen.

GAGLIARDO v. CRIPPEN *et al.*

AFFIDAVITS filed by a defendant, in opposition to an application for an injunction, made upon the complaint alone, are part of the record, and, upon appeal from the order, may be considered, although not embraced in the statement. When the equities of a complaint are fully denied by affidavits on the part of defendant, an application for an injunction, *pendente lite*, should be denied.

APPEAL from the Fourth Judicial District.

Lake, Shafter, and Brooks, for Appellant.

A. Campbell, for Respondent.

COPE, C. J. delivered the opinion of the Court—NORTON, J. and CROCKER, J. concurring.

This is an appeal from an order granting a preliminary injunction. The application for the order was heard on the complaint, and on an affidavit of the defendant Park in reply thereto.

It is objected that the affidavit is not properly a part of the record, as it is not embodied in a statement. The Practice Act (Sec. 343) dispenses with a statement in cases of appeal from an order made upon affidavits, and provides that the affidavits shall be annexed to the order in the place of the statement. The effect of this provision is to make the affidavits a part of the record, and the only question is whether it applies to the case of an order made upon the complaint as well as upon affidavits. The counsel for the respondent contends that it does not, but is limited in its application to orders made upon affidavits exclusively. This, we think, is not the proper construction. We regard the provision as extending to all cases in which affidavits may be used, and simply as dispensing with a statement as the means of making the affidavits a part of the record.

So far as the merits are concerned, we think the injunction was improvidently granted. The allegations of the complaint are fully and specifically controverted by the affidavit. It is claimed that the complaint itself is insufficient; but as the equities, whatever they may be, are denied, it is unnecessary to pass upon the objections to the complaint.

Order reversed, and cause remanded.

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HIGH v. SHOEMAKER *et al.*

THE constitutional provision, "that taxation shall be equal and uniform throughout the State," is not violated by a Revenue Act exempting from taxation church and school lands, and lands of the United States.

The omission in the Revenue Act of 1857, to tax all the lands in the State, did not render the act void for unconstitutionality.

The provisions of Sec. 13 of the Revenue Act of 1857, that the Tax Collector shall add to the tax of a delinquent five per cent. and enforce the collection of the same, in connection with the tax, by sale of the property, is constitutional, and a sale made in pursuance thereof passes a valid title.

The five per cent. is not a substitute for the tax or a penalty for its non-payment, but one of the means prescribed for obtaining the tax itself by offering an inducement to pay it when due.

The constitutional provision that no person shall be deprived of his property without due process of law, is not applicable to proceedings by the State to obtain from citizens their proper contributions to the expenses of administering the Government. Long-established practice, under a similar provision in other Constitutions, had fixed this qualification to the meaning of that clause at the time our Constitution was adopted.

Under the Revenue Act of 1857 the assessment of lands outside of a city or incorporated town need not describe the land by metes and bounds.

A description of land in an assessment roll as follows: "Four hundred acres of land situated on the Volcano and Jackson Road, in Township No. 1, of the County of Amador and State of California, and commonly known as the 'New York Rancho:'" *held*, to be sufficient under the Revenue Act of 1857.

APPEAL from the Sixteenth Judicial District.

Ejectment to recover a tract of land in Amador County called the "New York Rancho."

The complaint alleges that in 1858 the premises were owned by one Hammond, and in the month of May, of that year, an assessment of forty-eight dollars and sixty-eight cents for State and county taxes was made thereon; that the property was assessed to Hammond, and was described upon the assessment roll as "Four hundred acres of land, situated on the Volcano and Jackson Road, in Township No. 1, of the County of Amador, and State of California, and commonly known as the 'New York Rancho;'" that on the third Monday of October of that year, the taxes being unpaid, the Tax Collector levied thereon, and made an entry of the levy on the assessment roll, and charged the delinquent, Hammond, five

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per cent. additional upon the amount of the original tax; that the collector made out the delinquent list as required by law, in which the property was described as in the assessment roll, and opposite the name of Hammond therein was placed the amount of the tax and the five per cent. and costs, and that this list was duly published with a notification of the time and place where the property would be sold for payment of the amount thus due; that in pursuance thereof and in due form as prescribed by law, the land was exposed to sale; that Henry Barton became the purchaser of the whole rancho, that being the least portion of the land for which any bidder offered to pay the taxes, per centage, and costs; that payment was made by Barton, and a certificate of sale issued to him, and after the expiration of six months—no redemption having been made—a deed in due form was made to him by the collector; that the title acquired by Barton is now through several mesne conveyances vested in the plaintiff; that defendants are wrongfully in possession, claiming under Hammond. Plaintiff prays for restitution of the property and damages in the sum of five hundred dollars.

Defendants demurred to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action. The Court below sustained the demurrer, and dismissed the action, and from this judgment the plaintiff appeals.

Robinson & Beatty, for Defendant and Respondent.

I. The limitation of the taxing power as to the manner of imposing the burdens for the support of Government and its citizens, has its foundation in natural justice, as fully appears from all the authorities. (5 Dana, 31; 9 Id. 516; 4 N. H. 556; 6 Barb. 209; 2 Kent's Com. 331.)

By the Constitution, all property is to be uniformly taxed. By the Revenue Law, all property is not uniformly taxed. On the contrary, a large portion of property of various kinds and in different circumstances, claimed by private title, is especially exempted. Among the rest, all the land, embracing more than three-fourths of the territory of the State, belonging to the United States, is specifically exempted from contributing to the support of the Government.

That the land belonging to the Federal Government is subject to taxation by the State within which it lies, is a proposition sustained by all the authorized expositions, whether judicial or political, of the true character of the General Government in its relations to the States. (*Hayes v. Pallord*, 3 How. 212; McLean, 531.)

Here, then, in our Revenue Act, is found a flagrant violation of the principles of natural justice, the maintenance of which is expressly secured by the binding obligations of the Constitution, in the relieving from its duty to share the expense and support of the State Government, the private proprietorship of more than three-fourths of the whole landed interest in the State, and consequently casting the increased and unequal burden which should be shared alike by all, on the remaining fourth.

II. The summary disposal of the property of the citizen by the ministerial officers of the law for the payment of taxes is a violation of that fundamental principle of Government, "that no one shall be deprived of his property without due process of law." "All the cases," says a commentator on this subject, "conclude that the summary exercise of this power is against the spirit of the Constitution, but defend it on the ground of immemorial usage and State necessity." (Blackwell, 41.)

To justify the exercise of usurped powers, by a Government which professes to owe its powers to an organized law, on the score of State necessity, is opposed by the whole theory on which constitutional Governments are formed and enforced. And to assert that such a Government can claim on the score of the necessity of the State a power which is prohibited to it, is a contradiction in terms.

III. But whatever may be held as to taxes proper, the Constitution certainly forbids the collection of the five per cent. added thereto by the Revenue Act, by the summary process here adopted.

It is said, by the appellant, that this per centage is added to defray the expenses of collecting the delinquent taxes; it is costs. That it is not added to defray the expenses of collecting is obvious from the considerations: 1st, that it is imposed on all persons who fail to pay their taxes on or before the third Monday in October of each year; and, 2d, that the same section of the statute provides that one-half the amount of this five per cent. shall go to the State, which is at no expense in collecting the delinquent tax.

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That it is not costs is not only rendered irresistibly clear by the last of the foregoing considerations, but is further demonstrated from the fact that this five per cent. is no where denominated costs, but in Sec. 14 of the Act, provision is made for the payment of costs, *co nomine*, and throughout the statute the charge for services rendered or expense incurred is mentioned as costs and provision made for their payment.

That it (the five per cent.) is not tax, is shown from the following considerations: 1st, it is no where denominated or referred to as a tax throughout the statute; 2d, it is not assessed by the officer designated by the Constitution as the person clothed with that power (the Assessor), but is to be imposed by the Tax Collector; 3d, it is not apportioned as taxes are between the State and counties as their respective needs require, but one-half goes to the State and the other to the county, at all events; 4th, it is not laid for the support of the Government; 5th, if it were a tax, it would be an obvious violation of the rule of uniformity in taxation, inasmuch as it would impose a greater burden on one than it would on another, each having property of the same kind and value.

This additional charge is then, from the nature and character of it and from the language of the statute, a penalty, and so the Court has designated it in *The People v. Seymour* (16 Cal. 344). As a penalty, its enforcement in the summary mode herein adopted cannot be justified on any ground of "State necessity." "This power of collecting taxes in a summary mode, though indispensable, must be used only to the extent absolutely demanded by the public necessities, and never abused by applying it to the purposes of penal enactments, and, under the guise of taxation, to impose penalties which are to be enforced without recourse to the ordinary tribunals." (Blackwell on Tax Titles, 41, 42; *Burger v. Carter*, 1 McMullin's L., S. C., 420.)

The statute, in Secs. 14, 15, 17, 18, furnish the whole authority under which the collector acts in selling land for taxes. These constitute his power of attorney. He acts under a naked statutory power, and he must pursue its instructions strictly and exhibit his powers clearly. But these sections give to him no right to sell the land of another for anything else but for taxes and costs. If, then,

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this five per centage is not cost and taxes, which has been clearly shown, he had no authority to make the sale, or rather he has exceeded his authority and his acts and doings herein are void. The authorities to sustain are collated by Blackwell, on page 192 of his Treatise.

IV. The statute (Sec. 4, Wood's Dig. 615) requires the assessment roll to "give the metes and bounds, the quantity of each tract outside of a city or town, and the locality and township where it is situated." The description in this case does not comply with the requirements of the statute, inasmuch as it omits to describe the "locality" of the tract assessed, nor does it give the "metes and bounds."

This question has before been passed upon by this Court, in the case of *Lachman v. Clark* (14 Cal. 133), and therein the requirements of the statute strictly enforced, as well as in the case of *Ferris v. Coover* (10 Cal. 632). The difference in point of description between the first-named case and the one at bar is scarcely discernable. In that case, the name of the rancho was given, its situation on the Auburn Road, and its locality as regards its distance and direction from Grass Valley. But the number of acres, the boundaries, and the township, were omitted. In this case, the name of the rancho is given, the number of acres, and also the township, but there are no boundaries mentioned and no locality named by which the place could be identified, other than by the designation of the New York Rancho.

Farley and Armstrong, for Plaintiff and Appellant.

I. The constitutional provisions that taxation shall be equal and uniform, does not require universality of taxation. The Legislature may exempt a part of the property of the State from paying taxes. (*People v. Naglee*, 1 Cal. 252; *People v. Coleman*, 4 Id. 53; *Thompson v. Williams*, 6 Id. 88; *People v. Rogers*, 13 Id. 165; *People v. Railroad Co.*, 1 Mich. 460; Sedgw. Cons. Law, 557.)

II. The five per cent. added to a delinquent tax is costs, and may be collected by the same process as the tax itself, without vio-

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lating the Constitution. (*People v. Seymour*, 3 Ohio, 277; *Sears v. Cottrell*, 5 Mich. 262; 4 Comstock, 428.)

III. The description of the property in the assessment roll was sufficient. (Rev. Law 1857, Sec. 4; *Palmer v. Boling*, 8 Cal. 384; *Patten v. Green*, 13 Id. 328; *Sibley v. Smith*, 2 Gibbs, 508; *Blakeley v. Boston*, 13 Ill. 715; *Ervine v. Helmer*, 13 Serg. & Rawle, 156.)

The cases of *Kelsey v. Abbott* (13 Cal. 616), and *Lachman v. Clark* (14 Cal. 131), which are relied on by the respondents, are not in point. In the first case, there were two lots assessed together at the aggregate valuation of \$7,000, which was fatal of itself to the case; the lots were not assessed to the owner, or to an unknown owner, and the Court said the assessment was void for this reason alone, and such is unquestionably the law. It does not appear that the lot in question was situated in a city in fact, or in an incorporated town; and if not, the quantity of acres should have been given as near as possible; and if it was so situated the lot should have been designated by number, or some well known name, that it might have been known, which was not done, and this would avoid the title. But none of these objections exist in the case under consideration. It is true the Court said: "But the assessment is fatally defective in omitting to 'give the metes and bounds, or describing the premises by lots or fractions of lots.'" (Wood's Dig. 616, Sec. 4.) But this is not saying that a description by metes and bounds is absolutely necessary, and if it were, it would be mere *obiter*, because the case was decided upon another point involving fraud, as an examination of it will show; and, besides, the Court did not attempt to give an interpretation of the expression "or otherwise," used in the same sentence of the section quoted from, and the facts of the case show that the point was not involved in the decision.

The case of *Lachman v. Clark*, is not like the present. The land was situated outside a city or incorporated town. The number of acres as near as possible, or the township where the land was situated was not given, and both of these are expressly required by the second subdivision of the fourth section of the act (Wood's Dig. 616), and the question of boundaries was not involved in the decision of the case.

NORTON, J. delivered the opinion of the Court—CROCKER, J. concurring.

This is an action of ejectment, in which the plaintiff claims title under a tax sale. A demurrer to the complaint was sustained and a judgment rendered in favor of the defendant, from which the plaintiff has taken this appeal.

The complaint sets forth a levy of the tax and subsequent proceedings for a sale of the premises under the Revenue Act of 1857, and the first objection taken is, that the law is void because certain lands, such as church and school lots, and the lands of the United States, are exempted from taxation, contrary to the provisions of Sec. 13 of Art. 11 of the Constitution of this State, by the terms of which it is required "that taxation shall be equal and uniform throughout the State," and that "all property in this State shall be taxed in proportion to its value, to be ascertained as directed by law."

The meaning of this section of the Constitution was considered by this Court in the case of the *People v. Coleman* (4 Cal. 46), in which the Court say: "If the position contended for by the respondent be correct, then all property must be taxed, and the Legislature would have no authority to exempt any species of property from taxation; yet the power of the Legislature to exempt the property of religious and eleemosynary corporations has not been doubted." And: "From these considerations we are of opinion that the words 'equal' and 'uniform' apply only to a direct tax on property; that the Legislature may select or exempt such property as in its discretion it may think proper," etc. Although that case arose upon a law imposing a tax which was considered a tax upon an avocation or business, and not directly upon property, yet it was necessary for its determination to consider the section in question; and if the remarks above quoted may not be deemed an adjudication upon the direct question now under consideration, we think they are, for the reasons given in that case, a correct interpretation of the Constitution, and that the omission to tax a portion of the lands in the State does not render the Revenue Act of 1857 void.

It is further objected that the five per cent. charged by the col-

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lector, in pursuance of Sec. 13 of the Revenue Act, is a penalty, and cannot be collected summarily, but only, if at all, by due process of law. It, however, is not imposed in terms as a penalty or punishment. The tax payer is allowed until the third Monday of October to pay his taxes, and if at the close of that day he is in default, then further proceedings are to be taken to enforce the judgment. Among other things, the delinquent is charged five per cent. upon the amount of his tax. This is not an equivalent for the tax, or a substitute for it, or a sum fixed, by the payment of which an atonement is made for the default to pay the tax, but is one of the means prescribed for obtaining the tax itself by presenting an inducement to make voluntary payment on or before the day fixed for that purpose. We cannot say that it was not competent for the Legislature to authorize this per centage to be collected in the same way as the fees of the officers made necessary in other proceedings to enforce the payment of taxes. It might be admitted that the sale of property for the satisfaction of taxes, together with the expenses of the proceedings, summarily by an officer, without the previous judgment of a Court, is apparently inconsistent with the provision of our Constitution that a man shall not be deprived of his property without due process of law, and yet the Court not be authorized to declare the law void, because universal practice had established, at the time our Constitution was adopted, that this provision in Constitutions was not understood as applicable to proceedings by the State to obtain from citizens their proper contributions to the expenses of administering the Government. (See Blackwell on Tax Titles, cases cited, 40, 41.)

It is further objected that the description of the land sold fails to comply with the requirement of Sec. 4 of the Revenue Act, inasmuch as it does not give the "metes and bounds," or state the "locality." From the confused mode in which this portion of Sec. 4 is expressed, it is not possible to say that the requirements as to metes and bounds apply to lands lying outside of a city or incorporated town. If they do, then the alternative also applies, that they may be described "otherwise." The locality of the premises was sufficiently given, by stating that it was the tract known by a particular name, which is stated, and situated on a particular road,

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which is named, in a particular township of Amador County, unless indeed it were necessary to give its precise "metes and bounds," which, as we have seen, was not required.

The demurrer should have been overruled, and the judgment is therefore reversed, and the cause remanded for further proceedings.

On petition for rehearing, NORTON, J. delivered the opinion of the Court—COPE, C. J. and CROCKER, J. concurring.

The petition for rehearing in this case insists that by a change in the punctuation it may be made apparent that Sec. 4 of the Revenue Act of 1857, requires that in listing lands situated outside of cities or incorporated towns the metes and bounds must be given, and that it was so decided in the case of *Lachman v. Clark* (14 Cal. 133).

So long as the words of this section stand in their present order and coupled by the conjunction "or," no change in the punctuation can make it clear that the words "giving the metes and bounds," apply to country lands and not to city lands. Considering the whole sentence, it seems more probable that the intention was to direct country lands to be listed without saying in what precise manner, further than "giving" the quantity of acres and the locality and township where situated, and as to city lands not requiring the quantity, but "giving" metes and bounds, or other sufficient description. The probability of this being the intended meaning of the section is strongly corroborated by the fact, that this is substantially the provision upon this subject of every Revenue Act passed previous to the Act of 1857, and is very nearly the language of the Act of 1854, which was the last law previous to the one under consideration. (Act of 1854, 103, Sec. 73.) In any way of viewing it, however, the sentence is obscure and the meaning doubtful.

Under these circumstances, if a construction of the sentence had been distinctly given by this Court, and had become a guide for assessors, it should be followed. But no such construction has been given. In two cases the mode of listing country lands under the Act of 1857, has been referred to in general terms, but without a decision being made specially as to the exact application of the

words "metes and bounds." In *Patten v. Green* (13 Cal. 325), a tract of land lying outside the town of Petaluma was assessed under the Act of 1857, without giving any "metes and bounds," but giving the quantity of acres and the name of the ranch. The Court say that it was properly taxed by this description, within the case of *Palmer v. Boling* (8 Cal. 388). In this case of *Palmer v. Boling*, no metes and bounds were given, and the Court say: "To require a particular description of rural lands would be imposing an unnecessary burden on the officer." This assessment was under the law of 1854, which does not speak of "metes and bounds," and the case is therefore only applicable by being adopted in the case of *Patten v. Green*, which was an assessment under the law of 1857. The law of 1854 is, however, the same as we have supposed to be the meaning of the law of 1857, and the case of *Patten v. Green* in this way becomes an indirect construction of the law of 1857. In the case of *Lachman v. Clark* (14 Cal. 131), the Court say that Sec. 4 of the Act of 1857, requires lands outside of a city or incorporated town to be described by giving the metes and bounds, and the number of acres and the locality and township where situated. The exact application of the term "metes and bounds" was, however, not discussed by the counsel who sought to sustain that assessment, he resting his case on other grounds; nor was it specially considered by the Court. The assessment did not give the quantity of acres, nor the township where situated, and was for that reason fatally defective by the undisputed provisions of Sec. 4. That under these circumstances the Court coupled "metes and bounds" in a general remark, embracing these undisputed requirements, is not, we think, to be held to be a distinct adjudication on this separate question, certainly not more than the general remarks of a contrary sense, employed in the case of *Patten v. Green*. Neither case, we think, can be held to be a distinct construction of this section in this precise particular.

Of the many tax cases that have come before us, we do not remember one in which rural lands have been described by metes and bounds; and considering that such a description was not required by any tax law prior to 1857, and considering, to say the least, the very dubious meaning of the law of 1857, and which may

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reasonably be considered the same in effect as the law of 1854, and considering the influence of the decision in the case of *Patten v. Green*, we have no doubt assessors have generally interpreted the law as we do, and that very few if any assessments of rural lands made since 1857, any more than those made previously, have given the metes and bounds. A decision now that would overthrow all these assessments, should have plainer grounds to rest upon than the possible construction of so obscure a provision as that of Sec. 4 upon this subject, or the remark in the case of *Lachman v. Clark*, made under the circumstances we have mentioned.

Rehearing denied.

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A DEPUTY Sheriff may, after the expiration of the term of office of his principal and in the absence of the latter from the State, execute a deed to the purchaser at a judicial sale, made by the Sheriff while in office. The authority of the deputy is not impaired by the Act of 1858, allowing the deed in such cases to be executed by the succeeding Sheriff.

Under the fifth section of the Act of April 3d, 1858, providing for the collection of delinquent taxes in Sacramento, the purchaser at a tax sale made in pursuance of the act, is entitled to a writ of assistance against the person in possession of the premises, notwithstanding the existence of such fiduciary relations between the parties at the time of the sale, that a Court of Equity would hold the purchaser a trustee for the possessor in the purchase, on the ground of constructive fraud.

As a general rule, neither a tenant in common, nor a mortgagee, can acquire a tax title and set it up as against his co-tenant or mortgagor, but this rule rests upon the doctrine of constructive frauds, and is not applicable in a case where, by statute, the deed can only be attacked for actual fraud.

APPEAL from the Sixth Judicial District.

Application by D. O. Mills for a writ of assistance to obtain possession of an equal undivided one-third interest in and to lot number four, in the block or square between J and K streets, and Fourth and Fifth streets, of the City of Sacramento. The proceeding in the Court below was instituted under and by virtue of Sec. 5 of an Act of the Legislature, passed April 3d, 1860, entitled "An Act to provide for the collection of Delinquent Taxes in the

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City and County of Sacramento." In 1859, the lot in question belonged to Judson Haycock and George B. Haycock, as owners of one-third; to Carsilla Tukey, as owner of one-third; and to Francis Tukey, the defendant, as owner of one-third thereof. The taxes assessed upon it for the fiscal year ending March 1st, 1859, amounting, with costs and charges, to \$2,844 35, not having been paid by these parties, judgment for that sum was recovered against them, by virtue of the statute above mentioned, on the twelfth day of November, 1860, in the District Court of the Sixth Judicial District, in favor of The People of the State of California. Under this judgment, execution was issued against the said parties, directed to the Sheriff of the City and County of Sacramento, commanding him to make the said sum of money out of their personal, or, if that were insufficient, out of their real estate. He levied upon and sold the premises above described on the twenty-third day of September, 1861, to D. O. Mills, for \$2,832 90, and delivered to him a certificate of sale thereof. Afterwards, on the fourteenth day of April, 1862, more than six months having elapsed since said sale, and the term of office of the Sheriff having expired, and he having left the State, a deed was executed to Mills by B. B. Redding, who was the deputy of said Sheriff up to the expiration of his term of office. At and prior to the time when the judgment for taxes was recovered, D. O. Mills held a mortgage for \$6,000 on the above premises, one-third whereof, \$2,000, was due from the defendant, Francis Tukey. After the recovery of said judgment, but before the sale thereunder, D. O. Mills became, by purchase, the owner of the one-third interest in said premises which belonged to Judson and George B. Haycock. When the property was bought by D. O. Mills at the Sheriff's sale, he and the said Carsilla Tukey and the defendant, Francis Tukey, were, and have ever since remained, in possession, each of a third of the premises. The claim of D. O. Mills to the one-third interest of Carsilla Tukey having been satisfactorily adjusted, and the defendant having refused to surrender possession of the third held by him, this proceeding was instituted for its recovery. Prior to the sale of the premises for taxes, to wit: on the eighteenth day of July, 1861—Francis Tukey, then being indebted to D. O. Mills in the sum of

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\$2,000 on the mortgage aforesaid, and in other sums of money, and desiring to procure a loan of \$4,000 to cancel said indebtedness, and also enable him to pay his proportion of the said taxes, proposed to said D. O. Mills that the latter should temporarily take from him a mortgage for \$4,000 upon his third interest in said premises, and assign said mortgage to the party from whom said Tukey should afterwards be able to procure said loan. To this proposition, as Tukey believed he could in this way obtain the loan, Mills assented, and the \$4,000 mortgage was executed to him. Tukey failed to either obtain the \$4,000 loan, or to pay the taxes, wherefore the property was sold, and the \$4,000 mortgage still remains in Mills' hands unassigned. Upon these facts appearing in the petition and answer, and from the evidence on the trial, the District Court ordered the writ of assistance to issue. Defendant moved for a new trial, which was denied, and from these orders he appeals.

Crocker & Robinson, for Appellant.

I. The Act of the Legislature passed 1858 (See Acts 1858, 95), says that a deed in pursuance of a sale made by an ex-Sheriff who is out of the State, shall or may be made by his successor. The word "may," when applied to the act of an officer, is always construed "shall," and here the word "shall" is also used, showing conclusively that it was intended to confer the power exclusively upon the succeeding officer. (Sedg. 438.) This statute provides a new remedy for a defect which existed in the law, which by implication repeals the old law as to the Sheriff, Marshall, and places the right and power in another place, where it alone can be exercised. (Sedg. on Con. and Stat. L. 124-126; 10 Pick. 38, 39.)

II. Mills being tenant in common with Tukey, could not purchase the tax title for his own exclusive benefit, but held it in trust for his co-tenants. Community of interest provides a community of duty, and one tenant in common cannot pay up an outstanding incumbrance on an adverse title to disseize and expel his co-tenant. *Van Horne v. Fondu* (5 J. C. 407) is very full and clear on this point. (See, also, 6 Dana, 278, 171; 3 Id. 324; 4 Mon. 298; 1 McMul. 370, to the same point; also, 1 Wash. R. P. 430; 9

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Dana, 228 ; 1 A. K. Marsh. 230 ; *Burhaus v. Van Zandt*, 3 Seld. 523 ; *Eyre v. Dolphin*, 2 Ball & Bealty, 290, 298.)

III. Mills being mortgagee, cannot set up the tax title as against Tukey, his mortgagor, but must include it as an advance under his mortgage. (2 Ball & Bealty, 290, 298 ; 1 Ch. Cas. 191 ; *Godfrey v. Watson*, 3 Atk. 517, 518 ; 4 Kent, 198 ; Id. 190 ; 1 Pow. on Mort. 195 and note *n* ; 1 Wash. R. P. 583 ; 1 Hill. 437 ; Id. 436.) The rights of a mortgagor cannot be affected by a fine or a non-claim—or a recovery suffered by the mortgagee, for in equity the latter holds the estate only as security for the debt, and when paid he will be but a trustee for the mortgagor. (1 Pow. on Mort. 212, *a*.)

IV. Mills was in possession as tenant in common, and was therefore bound to pay the taxes ; and his neglecting to pay them, and taking a tax deed, will give him no additional title. The statute makes it the duty of the party in possession, to pay the taxes if the owner does not, and he can derive no benefit from a failure to pay them, thus suffering the property to be sold and buying it in. In equity, the purchase would be merely an advance. (*Kelsey v. Abbot*, 13 Cal. 619 ; 13 Penn., Stan., 322, 327 ; 5 Haywood, 294 ; 11 Ill. 300.)

V. The facts show actual fraud on the part of Mills, and this renders the sale void.

J. W. Winans, for respondent.

I. The deed from Redding, Deputy Sheriff, to D. O. Mills, was in all respects regular and sufficient to pass title. (*Wood v. Calvin*, 5 Hill, 231 ; *Tuttle v. Jackson*, 6 Wend. 224 ; *Jackson v. Collins*, 3 Cow. 95.)

The deputy's authority is not taken away by the Statute of 1853. This case comes directly within the operation of the rule, that where a right exists at common law and a new remedy is given by statute, the latter is cumulative, and either remedy may be pursued ; but where the right and the remedy both are given by statute, that remedy can alone be pursued. (*People v. Craycroft*, 2 Cal. 244 ; *People v. Raynes*, 3 Id. 367 ; *Cohen v. Barrett*, 5 Id. 210 ; *Ward v. Severance*, 7 Id. 129 ; *Roberts v. Landecker*, 9 Id. 267 ; *State v. Poulterer*, 15 Id. 526.)

II. The rule that a mortgagee or tenant in common can acquire no title under a tax sale against his mortgagor or co-tenant, so far as it exists, comes under the doctrine of constructive fraud, and is inapplicable to the express provisions of the statute which governs this case.

The statute under which respondent's deed was executed provides, that "any deed derived from a sale of real property under this act, shall be conclusive evidence of title, except as against actual fraud, or prepayment of the taxes, and shall entitle the holder thereof to a writ of assistance from the District Court to obtain possession of such property." It is only necessary to show that the fraud which defeats a tax title against a co-tenant or a mortgagor is a constructive or legal fraud, and that a distinction amounting to a contrast exists between constructive and actual fraud, to prove that our statutes, in limiting the defect of tax titles to actual fraud alone, meant to sweep away that which was formerly created by constructive fraud. In *Blackwell on Tax Titles*, 466, that commentator devotes a chapter to sales "actually and constructively fraudulent," in which he distinguishes between these as involving in the one case positive and in the other inferential fraud. Positive fraud, he says, "of course renders the sale void." He then proceeds to declare: "Though positive frauds sometimes occur, the most numerous kind are those usually denominated constructive, or that class of fraud which may be inferred from the violation of public or private confidence; from the privity of the purchaser with the title sought to be divested; or on account of their being contrary to public policy." And under this middle class of persons having privity with the title, he introduces the cases of a mortgagee in possession (p. 472) and a tenant in common (p. 472), "in such case"—that is, in a case where he is a person—"whose duty it is to pay the taxes."

COPE, C. J. delivered the opinion of the Court—NORTON, J. concurring.

This is an appeal for an order granting a writ of assistance to put the plaintiff in possession of an undivided interest in certain property in the City of Sacramento. The proceeding was instituted

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under the fifth section of an Act of the Legislature, passed April 3d, 1860, entitled "An Act to provide for the Collection of Delinquent Taxes in the City and County of Sacramento." The section provides, that "any deed derived from a sale of real property under this act shall be conclusive evidence of title, except as against actual frauds and prepayment of the taxes, and shall entitle the holder thereof to a writ of assistance from the District Court to obtain possession of such property." The sale was made by one Marshall, who was then Sheriff of Sacramento County, and the deed was executed by his deputy after the expiration of his term of office and during his absence from the State.

It is objected that the deputy had no authority to execute the deed; and the Act of 1858, "for the relief of purchasers at sales of real estate by public officers," is referred to as sustaining the objection. The act (Sec. 1) provides, that "where lands have been or may hereafter be sold by a Sheriff, or other authorized officer, for taxes, or under an execution or order of sale, the purchaser or his assigns may be entitled to a deed, and the Sheriff or other officer who made the sale is dead, or absent from the State, or in any wise disqualified, it shall or may be lawful for the successor of the said Sheriff, or other officer, to make such deed to such purchaser, his assignee or assignees, in the same manner and with the same effect, as if made by the officer making such sale." Under the law as it stood prior to the passage of this act, the successor of the officer making the sale had no power to execute the deed, and the effect of the act is simply to confer upon him the power to do so. It takes nothing from the authority of the officer who made the sale; and his power to execute the deed, either by deputy or in person, continues as before. The object was to relieve the purchaser and not to limit the power of the officer. In case of death or disqualification, of course the deed must be executed by the successor, and it may be executed by him in the case of absence. In the latter case, however, his authority is not exclusive, unless the absence be such as to amount to a disqualification. The whole subject is a matter of statutory regulation, and there is nothing in the act in question operating as a repeal or modification of previous statutes.

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It is objected further that at the time of the sale the parties were tenants in common of the property, and that the plaintiff was the holder of a mortgage upon the interest of the defendant. These objections would be decisive of the case if it were not for the fact that the statute under which the sale was made gives conclusive effect to the deed, except as against actual frauds and prepayment of the taxes. The sale was made on a judgment regularly obtained, and there is no doubt that under the statute the title passed, and that the plaintiff has a right to the possession of the property. As a general rule, neither a tenant in common nor a mortgagee can acquire a tax title, and set it up as against his co-tenant or mortgagor, but this rule rests upon the doctrine of constructive frauds, and is not applicable in a case like the present, where the fraud must be actual. It is possible that in equity the purchase would be regarded as a trust, and relief administered on that ground, but in this proceeding the defendant cannot avoid the effect of the deed. He must present a proper case for equitable interference before the assistance of the Court can be invoked in his behalf. His defense is based upon the invalidity of the deed, and under the statute the deed cannot be rejected as void.

Other objections are interposed, but they are not well taken.

The order is affirmed.

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THE Act of April 25th, 1863, providing for a subscription by the City and County of Sacramento to the capital stock of the Central Pacific Railroad Company, upon a vote by the electors of the county in favor of the proposition, is in its main features constitutional, and authorizes the making of the subscription and issuance of bonds as therein directed.

The tenth section, exempting the city and county from liability for the debts of the company, if it be unconstitutional (a point not decided) is not so essentially connected with the scope and object of the act as to invalidate its other provisions.

Where a provision of a statute is of such a nature and has such a connection with the other parts as to be essential to the law, its unconstitutionality vitiates the whole enactment. But if an independent provision, not in its nature and connections essential to the law, be unconstitutional, it may be treated as a nullity, leaving the rest of the enactment to stand as valid.

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Even where an invalid provision in a statute is in the nature of a condition to the main purpose of the law, its invalidity will not necessarily invalidate the whole law if the remaining provisions are sufficient to effect that main purpose.

Where a law is passed providing that certain acts shall be done upon the contingency of a vote of the electors of a district, the vote upon such proposition is not an act of legislation, but simply an event, upon the happening of which the law is to take effect.

In determining the constitutionality of an act which was to take effect, upon a vote of the people in its favor, it is not material to inquire whether an unconstitutional provision therein was so important, in the view of the voters, that, if its invalidity had been known to them, they would not have sanctioned the law.

The proposed Central Pacific Railroad, leading from the City and County of Sacramento to the eastern portion of the State, is so far a public improvement, and sufficiently for the apparent interest of the city and county, that a law authorizing the municipality to become a stockholder in the railroad corporation is not unconstitutional as imposing a tax upon a local community for an improvement in which it has no peculiar interest.

Per CROCKER, J.—Persons dealing with a corporation have the right to waive, by special contract or in any other proper mode, all claim upon the personal liability of the stockholders, or to limit or qualify the extent of that claim. The fact that such claim is founded upon a constitutional provision, can make no difference.

A party may waive a constitutional as well as a statutory provision made for his benefit.

How far the Legislature may, under the thirty-second and thirty-sixth sections of Art. 4 of the Constitution, regulate the individual liability of stockholders in a corporation, discussed and held open for future decisions.

APPEAL from the Sixth Judicial District.

April 25th, 1863, the Legislature passed an act, entitled "An Act to authorize the City and County of Sacramento to subscribe to the Capital Stock of the Central Pacific Railroad Company of California, and providing for the payment of the same, and other matters relating thereto." The first section provides for a special election, at which shall be submitted to the voters of the county a proposition for the county to take three hundred shares of stock. Sec. 2 prescribes the form of the ballot, and declares that if a majority vote for the proposition, the Board of Supervisors of the county shall subscribe and pay for the stock as thereafter directed. Sec. 3 directs the mode of subscribing. Sec. 4 provides for the preparation of county bonds, and Sec. 5 for their issuance in installments. Secs. 6–9 provide for the levy of a county

tax, and creation of a fund to meet the interest and redeem the bonds. The tenth section is given in the opinion of the Court; and the eleventh and last section makes the act a public act, and in force from its passage.

The election was held as provided by the act, resulting in a majority for the proposition.

The plaintiff alleges in his complaint, that he is a resident and tax payer of Sacramento County; that the defendants compose the Board of Supervisors of the county, and are about to subscribe for the stock and issue the bonds as provided in the act; that the Railroad Company is already largely indebted, and for this and future indebtedness the county will become liable; that the act is unconstitutional and therefore void, and prays that defendants be perpetually enjoined from making the subscription or issuing the bonds.

An order was made that defendants show cause why an injunction should not issue, and in connection with this a temporary restraining order. The motion was heard on the complaint, the answer filed by the defendants and affidavits, and an order made refusing the injunction and dissolving the restraining order. The appeal is taken by plaintiff from this order.

Tob Robinson & J. G. Hyer, for Appellant.

I. The tenth section of the act in question is unconstitutional, being in direct conflict with the thirty-sixth section of the fourth article of the Constitution which reads as follows: "Each stockholder of a corporation or joint-stock association shall be individually and personally liable for his proportion of all its debts and liabilities."

It cannot be questioned that the City and County of Sacramento (when this subscription shall have been made) will be a stockholder of a corporation within the meaning of this section, and thereby become liable for its (his) proportion of all the debts and liabilities of said company.

It may be contended that its (his) proportion of said debts, etc., is not clearly declared in the Constitution, although we think differently, yet the point is immaterial, because said proportion is

clearly fixed by law. (See Sec. 32 of Act concerning Corporations, Wood's Dig. 119, and amendment thereto by Act dated and approved April 27th, 1863.)

But independent of this view of the case, we think it clear that said exemption clause is void, because while the Constitution declares that each stockholder shall be liable for his proportion of the debts and liabilities, this clause declares that this particular stockholder shall not be so liable. The confiction is certain and evident, and one or the other must be void. And the question for determination is simply whether the Constitution or the statute is the greater; whether a law passed by the Legislature which in its essential particulars directly conflicts with the Constitution of the State can be upheld by the Courts.

It is contended, that the proportion of the debts of the corporation, for which each stockholder is liable, is only the amount of his subscription. In answer, we have only to say, that if the framers of the Constitution had intended to provide that when his subscription was paid up he should no longer be liable for corporate debts or liabilities, they would have said so in so many words. The language used in the Constitution is to be construed by the rules that govern the interpretation of other instruments, or such as are used in interpreting the ordinary sayings of men. There is not a set of rules by which its provisions may be explained to mean that the stockholder shall not be liable, when it says as plainly and positively as it is possible to express it in English language, that he shall be liable. (See Debates in Constitutional Convention, 136.)

Again, the act makes special provisions in favor of a particular corporation. Sec. 31 of Art. 4 of the Constitution provides, "Corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes." By the act here in question a special privilege and benefit is conferred upon a particular corporation, and thus, by its terms, conflicts with the above-quoted provision of the Constitution.

II. By the vote, the people only expressed their willingness to the making of the subscription under the provisions of the act, and under the limitations therein contained.

The unconstitutionality of the tenth section, therefore, destroys the

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force and virtue of the entire act. In the case of *The People v. Hill*, (7 Cal. 103) it is held, that the unconstitutionality of certain sections of a law will not vitiate the whole act, unless they enter so entirely into the scope and design of the law that it would be impossible to maintain it, without such obnoxious provisions. We submit that the case at bar comes within the rule here established, and that the tenth section does enter so entirely into the scope and design of the law that it would be impossible to maintain it without this section. This section, containing the exemption, is a vital and essential portion of the contract made between the City and County of Sacramento and the Central Pacific Railroad Company. It constitutes the principal feature of the agreement; and believing in the force and effect of this exemption, the people of the city and county were induced to yield their consent. To declare the section void, and yet maintain the act, is to destroy the only guaranty the people possess, and still hold them to their contract, and is to change wholly and entirely the agreement to which they consented.

Geo. R. Moore, for Respondent.

I. The law is full and perfect without the tenth section, and to strike this part out the balance would stand without objection.

"A part of a statute may be in conflict with some constitutional provision, and therefore void, while the balance of the law would be valid and binding." (*People v. Hill*, 7 Cal. 103.)

This act is identical with the Yuba County law, which has been passed upon and held to be constitutional by this Court. (*Pattison v. Supervisors Yuba Co.*, 13 Cal. 180; see also *Hobart v. Supervisors Butte Co.*, 17 Id. 29; *Grant v. Courter*, 24 Barb. 232; *City of Aurora v. West*, 9 Ind. 74, and cases cited in 13 Cal. 188.)

II. The tenth section of the act is constitutional. Sec. 36 of Art. 4 of the Constitution provides, that "Each stockholder of a corporation, or joint stock company, shall be individually and personally liable for his proportion of all its debts and liabilities." Now what is "his proportion of its debts and liabilities." Will not his proportion of its debts bear the same relation to the whole debt as his stock does to the whole stock. The words *personally* and *indi-*

vidually liable mean nothing more than that for his proportion of the debts, his individual and personal property, as contradistinguished from his corporate property, shall be liable—that is, after the corporate property has been exhausted.

If this is the proper interpretation of the Constitution, then there is no conflict between the thirty-sixth section of the Constitution and the tenth section of the act. Besides, the Legislature had the perfect right to impose this limitation, and to require that such restriction should be embraced in every contract made by the company; and all persons dealing with the company, with a knowledge of the limitation clause, would be bound by it, and the stockholders would not be liable for contribution outside or beyond their subscriptions. This view is fully sustained by the case reported in 19 Eng. Law and Eq. 627.

III. It is contended by the plaintiff that if the tenth section is not valid and no limitation is imposed, then the people voted on the proposition under a misapprehension of their liability, and that consequently they are not bound by their vote. As every one is deemed to know the law, the people could not legally withdraw their assent to the proposition, if they would, on the ground of ignorance. They voted upon the question, not as controlled by the tenth section (if that should be held invalid), but as the whole law will stand when construed and settled by our Courts.

The vote of the people did not change the law in the least. It gave it no more force or vitality and made it no more binding than when it left the hands of the Legislature. A statute may take effect at once or at some future time, or upon the happening of some event. In this case the contingency was the consent of the people. The law existed before, but was not to be enforced until this event transpired—until the people consented to accept its benefits and advantages. (*Hobart v. Supervisors of Butte Co.*, 17 Cal. 29.)

NORTON, J. delivered the opinion of the Court—COPE, C. J. concurring, and CROCKER, J. concurring specially.

This action is brought to restrain the Board of Supervisors of the City and County of Sacramento from subscribing for three thousand shares of the capital stock of the Central Pacific Railroad

Company of California, and from issuing any bonds of said county in payment of any subscription for such stock.

The Act of the Legislature, by authority of which the Board of Supervisors propose to subscribe for the stock and issue the bonds, was passed April 25th, 1863, and is entitled "An Act to authorize the City and County of Sacramento to subscribe to the Capital Stock of the Central Pacific Railroad Company of California, and providing for the payment of the same, and other matters relating thereto." (Statutes of 1863, 447.) The tenth section of the act contains this provision: "The said subscription of stock shall be made upon and the same shall be subject to the express condition that the said City and County of Sacramento shall not be liable or bound for the debts or liabilities of said company beyond or exceeding the amount of stock thus subscribed or held by said city and county; and all contracts made by said company for the construction or equipment of said railroad after such subscription shall have been made, shall be subject to said condition, whether expressed therein or not; and in case the said company shall fail or refuse to make such stipulation in all their said contracts, then the said Board of Supervisors shall have power to declare the said subscription void and of no effect, and may recover from said company any previous payments that may have been made thereon at the time of such failure or refusal."

It is insisted by the plaintiff that this provision of Sec. 10, exempting the City and County of Sacramento from liability for the debts and liabilities of the company beyond the amount of the stock subscribed, is void, because repugnant to Sec. 36 of Art. 4 of the Constitution, which provides that "each stockholder of a corporation or joint stock association shall be individually and personally liable for his proportion of all its debts and liabilities;" and that this provision being void it must result that the whole act is void. This result is claimed to follow for two reasons: 1st, because although an Act of the Legislature may in some cases be valid in part, although another part may be void, yet this is not the case when the part that is void enters so entirely into the scope and design of the law that without it the law cannot be maintained, and such it is claimed is the relation which the provision in question

bears to the whole act; and 2d, because the voters of Sacramento have only given their assent to the subscription for the stock upon the condition contained in Sec. 10, and that if that is inoperative their assent becomes inoperative.

It is not necessary to decide what will be the effect of this provision of Sec. 10, in case the City and County of Sacramento should ever be called upon as a stockholder to pay any debt or liability of the railroad company, because if it should be conceded that this provision would be ineffectual to protect the city and county from liability, this fact cannot have the effect to invalidate the other provisions of the act.

In the case of the *People v. Hill* (7 Cal. 103), the Court say: "that if some of the provisions of the bill are unconstitutional this will not vitiate the whole act unless they enter so entirely into the scope and design of the law that it would be impossible to maintain it without such obnoxious provisions." This remark is in consonance with numerous decisions made in other States. (*Town of Fishkill v. Fishkill & Beekman P. R. Co.*, 22 Barb. 634; *Campbell v. Union Bank*, 6 How. Miss. 625; *Clark v. Ellis*, 2 Blackf. 8; *Baltimore v. State*, 15 Md. 376; *Santo v. State*, 2 Clarke, Iowa, 262; *McCulloch v. State*, 11 Ind. 424.) But if the void provisions are so connected with the others, that without them the substantial object of the act cannot be accomplished, then the whole act is void. (*Warren v. The Mayor and Aldermen of Charlestown*, 2 Gray, 84; *State v. Com. of Perry County*, 5 Ohio N. S. 497.)

It is obvious that there can be no rule applicable to all cases by which it can be determined whether any particular provision is essential to effect the scope and design of the whole law. In the present case it is insisted that the provision exempting the city and county from liability for the debts of the company is so important an element in the law, that if it had been understood that it could not have effect, the voters of the county would not have sanctioned the law. Whether they would or not is, however, purely a matter of conjecture; and besides, it is immaterial, because their vote was not the act of legislation. It is precisely because this vote is not itself the enactment of the law which relieves the act from the

objection that the Legislature cannot delegate its powers directly to the voters. (*Hobart v. The Supervisors of Butte County*, 17 Cal. 23.) The result of this vote is only the contingency upon which the Legislature have expressed their will that the law shall take effect. The event has occurred, and the law, so far as it was dependent upon this event, takes effect, because the Legislature has enacted that it should take effect on the happening of that event. The result of the vote is a fact, the effect of which cannot be varied by any speculations as to what it might have been.

But the exact question upon which the objection weighs is, whether the provision of Sec. 10 is so vitally connected with the other provisions of the act that the Court is authorized to say that the Legislature would not have enacted the law if they had understood that this provision could not have effect. We have had frequent occasion to cite the principle that Courts are not authorized to annul an Act of the Legislature unless its violation of the Constitution is clear and beyond a doubt. This principle is applicable to this case. Unless the Court can see clearly that this section is so connected with the scope and purpose of the act that without it the Legislature would not have passed the law, we are not authorized to declare the whole act void. The scope and object of the law as expressed in the title, and as appears from the body of the act, are to authorize the City and County of Sacramento to subscribe for stock of the railroad company and to provide for the payment of the same. It is certain that this object can be accomplished, although the provision in question should form no part of the law. It is an independent provision declaring what shall be the effect of the subscription as to the liability of the subscriber. Indeed, the subscription may be made upon the condition specified, and as between the subscriber and the company, and also as between the subscriber and any creditor in whose contract this condition is embodied, it would, we think, be operative. The only portion which can be claimed to be clearly void is that which provides that contracts not containing the condition shall nevertheless be subject to it. If the company shall make any such contracts the Board of Supervisors are empowered to declare the subscription void, and to recover any payments that may have been made. The Legislature

seem to have contemplated that this portion of the provision might not be operative to protect the subscriber, and have therefore afforded another remedy, to a certain extent, which would have been useless if there was no doubt of the efficacy of this portion of the provision.

Upon a consideration of all these circumstances, we do not consider ourselves authorized to say that the Legislature would not have enacted the law if they had supposed that this portion of Sec. 10 would be inoperative of itself to protect the subscriber from liability, and we must hold that the law in question is not obnoxious to any constitutional objection, except that portion of the tenth section which provides that contracts not containing the condition mentioned in that section shall be subject to it, and that the invalidity of that portion does not affect the validity of the residue of the act.

The judgment is therefore affirmed.

CROCKER, J.—I fully concur with my associates in the judgment rendered in this case and in all the points decided, with the exception of that portion of the opinion which seems to imply that that part of the tenth section which provides that contracts not containing the condition mentioned in that section shall nevertheless be subject to it, is obnoxious to the Constitution. That persons dealing with a corporation have the right to waive by special contract, or in any other proper mode, all claim upon the personal liability of the stockholders, or to limit or qualify the extent of that claim, I have no doubt. The fact that such claim is founded upon a constitutional provision can make no difference, for a party may waive a constitutional as well as a statutory provision made for his benefit. (Sedg. on Stat. and Con. Law, 111.)

Corporations under our laws have been spoken of as being little different from special or limited partnerships, or joint stock associations, at the common law (*Mokelumne Hill Canal Company v. Woodbury*, 14 Cal. 267; *Chater v. San Francisco S. R. Company*, 19 Id. 246), which, however, is only correct in a qualified sense. Still, treating them in that character, I think it clear that a creditor of a joint stock association or partnership would be bound by an agreement made by him waiving or limiting the personal res-

ponsibility of the members. (Story on Partnership, Sec. 164; Collyer on Partnership, Secs. 1091, 386, 486.) And where there is a stipulation or provision in the articles of partnership, or association, or by-laws, regulating, qualifying, or limiting the extent of such personal responsibility, it has been held that a creditor dealing with such association or partnership, with full notice thereof, is bound thereby, on the ground of having assented thereto (*Kerridge v. Hesse*, 9 Carr. & Payne, 200; Collyer on Partnership, Secs. 1091, 98, 387, 488; Story on Partnership, Sec. 129; *Dow v. Sayward*, 12 N. H. 275; *Ensign v. Ward*, 1 John. Cases, 171); and such notice may be inferred from circumstances, such as a publication in a newspaper taken by the creditor. (*Livingston v. Roosevelt*, 4 John. 251.) Whether the same principle would apply to a regulation of liability by statute, of which all persons are presumed to take notice, it is unnecessary to decide.

The thirty-second section of Art. 4 of the Constitution provides that "Dues from corporations shall be secured by such individual liability of the corporators and other means, as may be prescribed by law." This clearly leaves the regulation of the liability of the stockholders of a corporation entirely to the Legislature, imposing no restriction whatever upon the power, but leaving them free to regulate the character and extent of such liability, according to their own discretion, and under it there can be no pretense that the Legislature has exceeded its powers in any of the provisions of this tenth section. The thirty-sixth section, however, provides that "Each stockholder of a corporation or joint stock association shall be individually and personally liable for his proportion of all its debts and liabilities." This seems to take from the Legislature all power over the subject, and if it is to be considered as controlling and virtually repealing Sec. 32, it may be a question whether it does not invalidate many of the statutes which have been passed from time to time, regulating this question of personal liability. How these two sections are to be harmonized so that both may stand, or if they cannot be thus reconciled, which shall control the other, constitutes the great difficulty in the construction of the Constitution upon this subject. Great public interests, as well as private rights of great value, are involved in its determination. The

subject is one of too much importance to be disposed of without a thorough investigation and a careful consideration. It is not necessary to determine it in the present case, nor do I consider the opinion of Justice Norton as intending to decide that point, and it may therefore properly be considered open to future adjudication.

On petition for rehearing, NORTON, J. delivered the following opinion—the other Justices concurring :

A petition for a rehearing has been filed in this case by counsel, who, it is understood, also represent parties interested in the operation of other laws similar to the one considered in this case, of which several were enacted by the last Legislature. The importance of the question, as well as the fact that several other laws involving the same question may be presented for consideration, has induced us to deliberate carefully upon the arguments presented in the petition for rehearing, but we have found no reason for changing our former opinion or for ordering the case to be re-argued. Indeed, upon the principal question no authorities have been cited nor any principles of law suggested other than those cases which were cited by us and those principles of law which were presented by us in our former opinion. The purpose of the petition has been to press upon us with great earnestness the authority and weight of those cases and those principles of law. Probably no other case can be found in which language so favorable for the plaintiff is employed, as that of the case cited from 2 Gray, 84, and none in which a decision favorable to the plaintiff was made in which the facts approach so near to this case as in the case cited from 5 Ohio, N. S., 497. The case in 2 Gray, however, does not furnish us any aid in searching for a criterion by which to determine when a void portion of a law is so connected with the other portions as to render the whole void, because in that case the vice was not in any particular provision, but in the purpose and effect of the whole law. The Court say : “ Before proceeding to consider the objections separately, we are all of opinion that if this act be unconstitutional at all, it is not in any separate and independent enactments, but in the entire scope and purpose of the act.” Hence, what the Court says as to parts being conditions, considerations, or compen-

sations for each other, had no application to the case before the Court, and receives no illustration from the facts of the case. In the case from 5 Ohio, the Court do not consider what effect the void provision would have had upon the residue of the law if it had rested solely upon the action of the Legislature, because by the Constitution of that State the question of the removal of a county seat, which was the case before the Court, is required to be left to the choice of the electors. By the law under consideration in that case the electors were not left free to vote upon the question of removal, but a provision was added calculated to compel them, by pecuniary considerations, to vote differently from what they otherwise might. The whole law, therefore, by which the question was submitted to the electors was held to be void. In the case before us, although the people were called upon to vote upon the question of subscribing for the stock, it was not by virtue of any constitutional requirement that the question must be submitted to them. It was not necessary to the validity of the law that it should have been submitted to a vote of the people, as it was in the Ohio case. In the Ohio case, the people, by the Constitution of that State, were authorized to say by their vote whether the county seat should be removed. In our case, the people are not authorized by a direct vote to determine whether the county shall have the right to subscribe for stock. The Legislature have seen fit to say that the law shall take effect or not, according to the result of a vote, simply considered as an event. As was shown in our former opinion, by reference to the case of *Hobart v. The Supervisors of Butte County* (17 Cal. 23), if the law was to take effect in consequence of the vote, considered as an expression of the will of the voters as to whether it was a proper law, the submission of the question to their vote would have been void, as amounting to an enactment of a law by the direct vote of the people, which cannot be done under our Constitution. In the State of Rhode Island and in the State of Iowa, and, we think, in other States, it has been decided that a provision in the statute submitting it to the people to say by their vote whether the law shall take effect is absolutely void, as being an attempt to delegate to the people directly the power of enacting laws which can only constitutionally be exercised by the Legislature.

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These decisions will perhaps commend themselves to many minds as resting upon clearer grounds of reason than those decisions which allow a law to take effect or not according to the result of such a vote, considered merely as an event, but at the same time deny that any legislative effect can constitutionally be given to such a vote. Yet in those States, while the provision of the statute submitting the law to a vote of the people was held to be wholly void, the statutes themselves were held to be valid laws, notwithstanding this invalid provision. (*State v. Copeland*, 3 R. I., 33; *Santo v. State*, 2 Clarke, Iowa, 262.) In this State as in the States of Rhode Island and Iowa, the validity of a law containing a provision submitting it to a vote of the people cannot be determined by inquiring into any supposed inducements that may have influenced the vote of the people, but must be determined by a consideration of the connection and relative operation of the valid and invalid provisions. But if the vote of the people could be considered as the act of legislation, the result would be the same. We must in that case apply the same considerations to determine the validity of a law passed by a direct vote of the people that are applicable to determine the validity of a law passed by the Legislature.

By what criterion can the Court decide that any particular provision is so essential that if it be invalid the whole law must be held invalid? In the case from 2 Gray the Court say, "if the invalid provision is so connected with the others as to warrant a belief that the Legislature intended them as a whole, and that if it could not be carried into effect the Legislature would not pass the residue independently," the whole is void. This criterion we applied in our former opinion, and concluded that tried by this test the law in question was valid in all its parts, except the obnoxious provision of the tenth section. But we have seen above that this criterion finds no illustration in the facts of the case in which it was announced, and upon scrutiny it will be found, we think, that this general language really furnishes no practical criterion. In one sense the Legislature must always intend all the provisions of an act "as a whole." The various sections and provisions are always enacted together as one law, when these sections and provisions relate to

the same subject. And by what process can a Court determine whether the Legislature would or would not have passed one portion if another portion could not have effect? If we were allowed to say that the legal presumption in all cases is that the Legislature would not have passed the law at all unless all its parts could have effect, we would have a simple criterion and a comparatively easy task. But, on the contrary, it is fully settled that although a part is void, the residue may be sustained.

The rule has a nearer approach to a practical criterion as it is given in the case of the *Exchange Bank of Columbus v. Hines* (3 Ohio N. S. 1), in which the Court say: "Where the provision of a statute is of such a nature, and has such a connection with the other parts of the statute as to be essential to the law, its unconstitutionality vitiates the whole enactment. But if an independent provision, not in its nature and connection essential to the other parts of the statute, be unconstitutional, it may be treated as a nullity, leaving the rest of the enactment to stand as valid." In the case of *Clark v. Ellis* (2 Blackf. 8) the rule is given in these words: "A part of an Act of Assembly unconstitutional does not affect a constitutional part of the same act relating to the same subject. That part which is unconstitutional is considered as if stricken out of the act, and if enough remains to be intelligibly acted upon, it is considered as the law of the land." Tried by the test furnished in those cases there is no difficulty in deciding that the law under consideration is not wholly void. The provisions of Sec. 10 cannot be said with any reason to be essential to the main purpose and object of the law, and if that section were stricken out the remaining sections would constitute a complete law. The purpose of that section is only to add a certain incident and effect to the act of becoming a stockholder, but it is not of the essence of becoming a stockholder. This incident may fail, and yet the substance of the transaction remain. In all cases where a question of this kind arises, the provision which is found to be invalid has a connection with and qualifies or affects the other provisions. The Legislature does not insert provisions which are merely nugatory. Yet that it has such a bearing upon and qualification of the other provisions is not alone sufficient to constitute it so essential to the

law that, if it cannot take effect, the whole must fail. Even where the invalid provision is in the nature of a condition to the main purpose of the law, its invalidity will not necessarily invalidate the whole law, if the remaining provisions are sufficient to effect that main purpose. Thus in the case of the *Mobile and Ohio Railroad Company v. The State* (29 Ala. 573), a law is presented providing for a loan of money by the State to certain corporations. In order to obtain a loan the corporations are required to consent that, if they made default in payment, their charters should be forfeited, and that the General Assembly might declare them forfeited, and that any forfeiture so declared should be complete and effectual for all purposes, without any judicial proceedings for such purpose. The portion of this conditional provision which required a consent that the General Assembly might declare the charters forfeited without legal proceedings, was held to be invalid as attempting to confer judicial powers upon the Legislature. Nevertheless, the residue of the law was sustained, yet all the objections might have been urged in that case that are in this. It might plausibly be said that the Legislature of Alabama never would have passed the law to loan the money of the State if they had supposed that effect could not be given to the provisions for a prompt and effectual coercion of payment.

We dispose of this case upon the assumption that a portion of Sec. 10 is invalid, as claimed by the plaintiff, but do not decide that it is invalid, deeming it proper to leave that question to be definitely decided when, if ever, it shall be necessary to the decision of a case.

It is also suggested, in the petition for rehearing, that the Legislature cannot constitutionally impose a tax upon a local community, city or county (which will be the effect of this law), in order to aid a work of internal improvement beneficial to the State at large, but not peculiar to or belonging to the particular locality, or specially intended to promote its local interests. This question has been much discussed in other States. In the case of *Sharpless v. Mayor of Philadelphia* (21 Penn. 181) the Court conclude that if the road is merely a private affair, or if the city can have no interest in its construction, a law authorizing the city to become a

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stockholder would be void. But that a railroad, as in that case, leading from the interior of the State to the City of Philadelphia was not a private affair, but a public improvement, and that the Court could not say that the city had no interest in its construction. These considerations apply to the case before us. The road is a public improvement, forming a portion of a great line of communication between remote parts of the State, and indeed of the nation, and connecting with the City and County of Sacramento. We cannot undertake to say that the City and County of Sacramento are not interested in its construction.

Rehearing denied.

IN THE MATTER OF THE ESTATE OF HOWARD.

No petition is required as the foundation of a proceeding to probate a will; a petition is only necessary under the statute where the executor named therein accepts the trust, and then not for jurisdictional purposes.

The jurisdiction in a proceeding to probate a will depends upon certain facts which the Court, on reviewing the will, must inquire into and determine; and the mere possession of the will vests the Court with all the authority necessary for that purpose.

APPEAL from the Probate Court of San Francisco.

The facts are stated in the opinion.

Sidney L. Johnson, for Appellants.

The question is, did the Court acquire jurisdiction of the subject matter of the probate of the will of the deceased without the allegation of the residence of the testator in the county. The two cases of *Beckett v. Selover* (7 Cal. 215) and *Haynes v. Meeks* (10 Id. 110) show that such allegation is indispensable in applications for administration. In cases of probate of wills, the mere filing of the will in Court having jurisdiction is said to be equivalent to such allegation and to be all that the statute requires. In *Irwin v. Scriber* (18 Cal. 499) the doctrines of the opinion of Justice Burnett, in *Beckett v. Selover*, were somewhat limited; and in the second case of *Haynes v. Meeks* (20 Cal. 288) those of the first case above cited were discredited, although binding in the

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particular case. None of them decided the point here presented. In *Abila v. Padilla* (14 Cal. 103) the absence of any proof of citation of the heirs was held to be cured by the appearance and answer of the heirs.

In *Stuart v. Allen* (16 Cal. 473, 501) the effect of the averments of a petition asking an order for the sale of real estate was considered. The case of *Gregory v. McPherson* (13 Cal. 562, 577) was cited, but the opinion referred to being that of one of the Justices only, was held not to be authoritative, although not contravened by anything in the decision of *Stuart v. Allen*. In the former case, Mr. Justice Baldwin held the averment of certain facts indispensable to the exercise of jurisdiction. In *Stuart v. Allen* the petition was held to comply in substance with the requirements of the statute. At the same time it is remarked, "that it is immaterial, so far as this question of jurisdiction is concerned, whether the statements of this petition are true or not; the jurisdiction resting upon the averments of the petition, not upon proof of them."

Again, it is objected to the applicability of these cases, that the Court was governed in them by the express requirements of the statute, and that in the case at bar no statute required more than was done.

Reference is made by the counsel for respondents to the case *In the Matter of the Will of Warfield* (22 Cal. 52). In that case the petition was lost, and the question was the admissibility and sufficiency of the secondary evidence to show that a proper petition had been presented. It was denied that the probate of the will had been asked for, and it was found upon the secondary evidence that the probate of the will and the issuance of letters testamentary had been asked for in compliance with Secs. 5 and 6 of the statute. Nothing is said in the opinion upon the necessity of any other averments.

In *Townsend v. Gordon* (19 Cal. 188) the averments of a petition for the sale of real estate were held fatally defective, and the rule of a strict construction of the proceedings of our Court of Probate, prior to the Act of 1858, was adhered to. That act, changing the rule of construction, is said to have no application to

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proceedings taken before its passage. To the same effect is the decision in *Gregory v. Taber* (19 Cal. 397).

Hoge & Wilson, for Respondents.

COPE, C. J. delivered the opinion of the Court, NORTON, J. and CROCKER, J. concurring.

This is an appeal from a judgment of the Probate Court of the City and County of San Francisco. The only question raised is whether the will of the deceased was properly probated, so as to give the Court jurisdiction of the estate. The petition of the executors, presented with the will, and praying its admission to probate, omits to state that the testator died in the County of San Francisco, and this omission is supposed to be fatal to the proceedings. It is claimed that the petition should have set forth the facts necessary to give the Court jurisdiction of the case, and that the admission of a will to probate upon a petition defective in this respect is void.

We have made a careful examination of the provisions of the statute under which the will was probated, and we are of opinion that no petition was required as the foundation of the proceeding. Sec. 4 of the statute (Wood's Dig. 372) provides that "Any person having the custody of any will, shall, within thirty days after he shall have knowledge of the death of the testator, deliver it into the Probate Court having jurisdiction of the case, or to the person named in the will as executor." Sec. 5 provides that "Any person named as executor in any will shall, within thirty days after the death of the testator, or within thirty days after he has knowledge that he is named as executor, present the will, if in his possession, to the Probate Court which has jurisdiction." Sec. 6 provides that "If he intends to decline the trust, he shall at the same time file his renunciation in writing; if he intends to accept, he shall present with the will a petition praying that the will be admitted to probate, and that letters testamentary be issued to him." Sec. 13 provides that "When any will shall have come into the possession of the Probate Court, the Court shall appoint a time for proving it," etc.

It is obvious that neither of these sections contemplates the pre-

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sentation of a petition as the means of giving the Court jurisdiction, and it is only in the case of an executor who intends to accept the trust that a petition is required. It is required in such case, however, not for jurisdictional purposes, but as information to the Court of his willingness to accept the trust; and so far as the jurisdiction is concerned, its presentation is an immaterial matter. The jurisdiction depends upon certain facts, which, on receiving the will, the Court must inquire into and determine, and the mere possession of the will vests the Court with all the authority necessary for that purpose. In the present case, the proof shows that the will was presented to the proper Court, and we are of opinion that its admission to probate was regular and valid.

Judgment affirmed.

CALIFORNIA STATE TELEGRAPH CO. v. ALTA TELEGRAPH CO. *et al.*

EXCLUSIVE franchises and privileges may be conferred by the Legislature upon persons or corporations, and no restriction upon this power is imposed by the State Constitution except as to the particular privileges specified therein.

The Act of May 3d, 1852, granting to Allen & Burnham the exclusive right to a line of telegraph between Sacramento and San Francisco, is constitutional.

Corporations formed under the general law have the power to purchase and hold an exclusive franchise or privilege granted by the Legislature to an individual and his assigns.

A corporation may receive from the Legislature a direct grant of special privileges and franchises.

The provision in the Act of May 3d, 1852 (granting to Allen & Burnham the exclusive right to a telegraph line between San Francisco and Sacramento), that "no existing law shall be so construed as to conflict or interfere with the provisions of this act," did not operate as a repeal of the general corporation law so far as to take away the right of forming corporations to build lines between those cities, but only to subject subsequent builders to the prior exclusive privileges of the grantees.

The power of a corporation, by the law under which it is created, to purchase a particular character of property cannot be questioned in an action between it and another corporation or person. It is a question between the corporation and the State, to be determined in a proceeding by the latter for a forfeiture.

—COPE, C. J.

APPEAL from the Twelfth Judicial District.

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The facts are stated in the opinion. The only portions of the Act of May 3d, 1852, material to the decision, are the first and second sections, as follows :

“SEC. 1. The right and privilege is hereby granted to Oliver E. Allen and Clark Burnham, or their assigns, to construct and put in operation an electro-magnetic telegraph line from the City of San Francisco to the City of Marysville, by the way of the cities of San José, Stockton, and Sacramento, with the right of way over any lands belonging to this State, and on or along any streets, roads, or highways, or across any stream or streams ; *provided*, they do not obstruct the same, and no person or persons shall be allowed to locate, or construct, or run any telegraph line, or any portion thereof, within a half a mile of the line or route selected by the said Allen & Burnham, or their assigns, except that when within half a mile of any incorporated city the proprietors of any similar line of telegraph may enter said city and depart therefrom, making their station therein within twenty yards of the station of said Allen & Burnham, or their successors, for the term of fifteen years ; *provided*, that the said above named parties or their assigns, shall within eighteen months from the passage of this act, construct and put in operation a telegraph line from the City of San Francisco to the City of Marysville, by the way of San José, Stockton, and Sacramento ; *provided*, also, that this act shall not prohibit the construction of local side lines. But lines shall not be constructed nor offices established so as to do business directly or indirectly between the cities aforesaid ; but side lines may establish offices in said cities for the transmission of communications to and from the main line. This line shall be bound to do the business of said lines, and to transmit all dispatches in the order in which they are received, under the penalty of one hundred dollars, to be recovered, with costs of suit, by the person or persons whose dispatch is postponed out of its order as herein prescribed ; *provided*, however, that an arrangement may be made with the proprietors or publishers of newspapers for the transmission, for the purpose of publication, of intelligence of general and public interest out of its regular order ; and, *provided* further, that preference may be given to Sheriffs and other civil officers for transmission of intelligence for the detection and capture of criminals.

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"SEC. 2. No existing law shall be so construed as to conflict or interfere with the provisions of this act; *provided*, that the owners of this line shall at all times conform to the present law of the State concerning telegraph companies, so far as it relates to the transmission of messages."

N. Bennett, E. R. Carpenter, and S. Heydenfeldt, for Appellant.

I. The Act of the Legislature passed May 3d, 1852 (Compiled Laws, 259), conferring upon Allen & Burnham, or their assigns, the right to construct and put in operation a telegraph line between the points mentioned, with the exclusive privilege annexed thereto, is constitutional and valid. An Act of the Legislature will never be declared unconstitutional and void except in a clear and plain case, and where there is an entire freedom from doubt. (*Dartmouth College v. Woodward*, 4 Wheat. 625; *Cooper v. Telfair*, 4 Dall. 14; *Ex parte McCollum*, 1 Cowen, 564.) The Legislature possesses all powers of a legislative nature, the exercise of which is not prohibited to it by the Constitution of the United States, or by the Constitution of this State. (See opinion of Judges in *Winehamer v. The People*, 3 Kern. 390, 411, 428, 462, 452, 465, 476, 482, and 1 Cal. 65; 4 Id. 46; *Bennet v. Boggs*, 1 Bald. 74, 75; *Cochran v. Van Surley*, 20 Wend. 381; *Sharpless v. The Mayor, etc.*, 21 Penn. 149, 162.) The Act of May 3d, 1852, above referred to, falling properly within the scope of legislative action, must be valid, and must have conferred upon Allen & Burnham the right claimed, unless the power to pass such act was taken from the Legislature either by the Constitution of the United States or by the Constitution of the State. It is not claimed, and if it were, it would not be a proposition deserving of serious consideration that any such prohibition exists in the Constitution of the United States, and therefore, so far as respects such Constitution, the Legislature had the power to enact the statute of May 3d, 1852. Such act does not fall within the inhibition of any particular article, section, or clause, nor within the spirit and meaning of the entire body of the Constitution of the State, and that for the following reasons, to wit: 1st, there is no portion of the Constitution of the State which will be claimed to render such act unconstitutional, ex-

cept Secs. 31 and 33 of Art. 4; 2d, the act is not unconstitutional under those sections, unless it forms or creates a corporation; 3d, the act referred to does not form or create a corporation within the meaning of those sections of the Constitution.

The act is simply a grant to Allen & Burnham, or their assigns, in their individual character, and does not confer upon them, or either of them, a single characteristic of a corporation. Then how can it be contended that the act forms or creates them into a corporation and is therefore obnoxious to the prohibitions of the Constitution, and on this account unconstitutional and void? (See the masterly opinion of Mr. Senator Verplanck in *Warner v. Beers*, 23 Wend. 131, in which he analyses the constituent parts of a corporation with great subtilty as well as ability.)

II. The Constitution does not forbid the granting of exclusive privileges either to natural persons or to corporations. The constitutional inhibition extends no further than to the formation or creating of corporations by special acts of the Legislature. It cannot, therefore, be said that the grant of an exclusive privilege to Allen & Burnham, or their assigns, did *ipso facto* create them a corporation and thereby infringes on the Constitution.

The Constitution merely declares that "corporations shall not be created by special act." This is the entire extent of the prohibition. A corporation can never be created by implication, except where there is no possible way of giving effect to an act or a grant otherwise than by holding it to constitute a corporation. (*Warren v. Beers*, 23 Wend. 175, 176.)

An instance is given in *Dyer*, 100, of a corporation by implication. It is thus stated: "As if the Crown should grant lands to 'The Men of Islington,' without saying to them and their successors, this was held to incorporate them forever for that purpose, for without such incorporation the grant would fail, and the continuous identity of the grantees is sufficient to build an implication upon." But that case is essentially different from the present case. There, the grant was made to a body of men, without specifying any one individual; here, the grant is made to individuals by name. There, a continuous succession in the "Men of Islington" was necessarily implied; here, the grant would descend to the heirs, administrators,

or executors of Allen & Burnham, or their assigns. This case from Dyer, however, can have but little application in these days, for no such grants are made in the present times, and the law of corporations has been so much enlarged, modified, and refined since the decision of that case, that we may now with safety say that no such thing is known to our law as a corporation by implication.

When the object of a grant can as well be effected without instituting a corporate existence it will never be implied. The presumption in cases of doubt is against such corporate existence. (See *Pennsylvania R. R. Co. v. Canal Comm'rs*, 21 Penn. 9; Sedgwick on Con. and Stat. Law, 342; Angell & Ames on Cor. Secs. 77-79; *Stebbins v. Jennings*, 10 Pick. 187; *Tone v. Ash*, 10 B. & Cres. 349; *Medical Institute v. Patterson*, 1 Denio, 618; S. C. 5 Id. 618.) These cases sustain the position that an Act of the Legislature will not be considered to create a corporation if there be any other mode by which the rights granted can be enjoyed.

III. The Act of May 3d, 1852, is not objectionable on the ground of its conferring a monopoly on Allen & Burnham or assigns. The Legislature has the power and the right in its discretion to grant exclusive privileges, or—which is the same thing—monopolies, in all cases where there is no constitutional objection. (See Sedgwick on Con. and Stat. Law, 625, 626.)

Now there is not in the Constitution of this State any prohibition, either express or implied, against the power of the Legislature to grant special privileges or monopolies. This is a matter which is left by the Constitution entirely within the discretion and control of the Legislature.

If then there be no prohibitory clause in the Constitution, the Legislature, in the proper exercise of legislative power, may grant franchises, special privileges, monopolies. The power to make such grant must necessarily reside somewhere, either in the sovereignty of the people themselves, or in the modified sovereignty of the Legislature acting in subordination to the Constitution. To hold that, it would be necessary to apply to the people in their sovereign state for the grant of every franchise, special privilege, or which is the same thing, monopoly, would not meet the assent of any

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man, lawyer, or layman; and hence it follows that the power must be vested in the Legislature, to be exercised by them as their sound discretion shall dictate.

The grant of the privilege to build a ferry, or a bridge, is a franchise, exclusive privilege, monopoly, of the same nature as the grant to Allen & Burnham. Does any one doubt the power of the Legislature to grant a bridge or ferry franchise with exclusive privileges?

In the *Terms de Ley*, 384, a ferry is called a liberty, and this liberty, synonymous with franchise, or exclusive privilege or monopoly, depends for its extent upon the terms of the grant (2 Dane's Abridg. 683; *Stark v. McGowan*, 1 Nott & McCord); and these franchises may be vested either in natural persons or in bodies politic, in one man or in many (10 Petersdorff's Abr. 53). But the same franchise that has been granted to one cannot be bestowed on another, for that would prejudice the former grant (10 Petersdorff's Abr. 53; also, 13 Viner's Abr. 513). Thus, as has been said, a ferry is an exclusive privilege or monopoly of the same nature as the grant to Allen & Burnham. (See also upon this same position, *Blissett v. Hart*, Willis 512; 1 Rolle's Abr. 140; Nuisance G. line 29; Comyn's Dig. Title Piscary, B; 1 Nott & McCord, 387.)

But cannot the Legislature grant a ferry privilege? That would seem to be unquestionable. If so, it may grant any other franchise, exclusive privilege, monopoly. The extent and duration of such franchise must in every case be left in the sound discretion of the Legislature. It is not to be presumed that they have or will abuse such discretion. If they do, we know of no remedy, in case no fraud has been practiced.

Franchises, such as fairs or markets in England, and ferries and bridges in both England and our own country, and I may add this telegraph franchise to Allen & Burnham, are founded on good and sufficient consideration; such as the expenditure of money in establishing and maintaining them for the convenience and business facilities of the public. They are all *publici juris*, and from the rights, liabilities, and duties of which they are compounded, results the notion of property in them. The right to receive money for the

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use and enjoyment of those franchises, is recognized as property, and protected as property, both by the law of England and of this country, and a grant of them vests in the grantee a beneficial interest, which may be leased, sold, or incumbered by him. These positions are sustained by the following authorities: (Maule & Selwyn, 247; 1 Crumpton & Jervis, Exch. 400; 5 Barnewell & Cress, 875; 6 Id. 703; *Webb's Case*, Coke, 92; Moore, 474; Gunning on Tolls, 106, 110; *Charles River Bridge v. Warren Bridge*, 11 Pet. 420; *Ogden v. Gibbons*, 4 Johns. 150.)

The grant of any such franchise is the grant of a right to an exclusive toll, consequently the grant of an exclusive privilege, a monopoly. (See authorities last above cited.)

It is laid down that in grants which abridge public rights, a consideration must in general be shown. (Hargrave's Law Tracts, "De Jure Maris," 18-36; Angell on Tide Waters, 106, 107.) This very doctrine implies that grants may be made which abridge public rights; and in the case at bar a consideration is shown.

Nor can it make any difference in principle whether public rights over land or over water be abridged. The power in the one case necessarily implies and includes the power in the other. In *Carter v. Tharcot* (4 Burrows, 2161), Lord Mansfield says, that if the proprietor of land adjoining the sea "can show a right by grant or prescription, which supposes a grant, he may have an exclusive right in the arm of the sea or navigable river." The same doctrine is also clearly laid down in the following cases: (1 Durnford & East, 669; 4 Id. 439, 668; 1 Modern, 105; 2 Bosanquet & Pull, 472.) Such, then, is the law of England.

It is the law of New York. (*People v. Platt*, 17 J. R. 195.)

It is the law of Connecticut (1 Conn. 382), where the Court hold that the State may grant an exclusive right of fishing in arms of the sea or navigable rivers.

It is the law of Massachusetts (*Commonwealth v. Inhabitants of Charlestown*, 1 Pick. 180); and we may with safety assert that it is the law everywhere.

How can this Court make a distinction between different kinds of franchises? Whether over land, or over water? Whether of a ferry, or bridge, or of a telegraph? The power of the Legislature clearly extends to the one; why does it not to the other?

In England the granting of franchises or exclusive privileges pertained to the Crown in ancient times. In modern times, it seems to be exercised conjointly by the Crown and Parliament. The Legislature, conjointly with the Governor of the State, has the same power in making grants of franchises, etc., which belonged to the Crown and Parliament of Great Britain, save so far as that power is curtailed by the Constitution of the State. And we have already seen that the Constitution in no wise restricts or controls the Legislature in the granting of franchises or exclusive privileges. Indeed, one of the sections in Sedgwick on Constitutional and Statute Law is headed thus: "Of Statutes creating monopolies, granting franchises and charters of incorporation." (See Sedgwick, 338.) Thus, clearly showing that this learned writer and able lawyer understood it to be within the power of the Legislature, by statute, to grant monopolies or franchises.

The very rule itself, sanctioned by the American authorities, that grants of monopolies, franchises, exclusive privileges, etc., must be liberally construed in favor of the public (See Sedgwick on Con. & Stat. Law, 338, 339; *Providence Bank v. Billings*, 4 Pet. 514; *Parker v. Sunbury and Erie R. R. Co.*, 19 Penn. 211; *Charles River Bridge v. Warren Bridge*, 11 Pet. 420), necessarily implies that such grants may be made by the Legislature.

IV. The Act of May 3d, 1852, created a contract which is protected by the Constitution of the United States, and which no subsequent legislation or judicial decision can annul or impair. (See *Boston and Lowell R. R. Co. v. Salem and Lowell R. R. Co.*, 2 Gray, 1, et seq.; *Dartmouth College v. Woodward*, 4 Wheat. 518; *Fletcher v. Peck*, 6 Cranch, 135; *West River Bridge v. Dix*, 6 How. 507; *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 7 Pick. 507; *New Jersey v. Wilson*, 7 Cranch, 164; *Green v. Biddle*, 8 Wheat. 92; *Providence Bank v. Billings*, 4 Pet. 460; *Gordon v. Appeal Tax Court*, 3 How. 133; *Osborne v. Bank of U. S.*, 9 Wheat. 738; *Gardner v. Newburgh*, 2 John. Ch. 162.)

V. The plaintiff had capacity and power to purchase, take, and hold, the franchise granted to Allen & Burnham. The plaintiff was regularly incorporated under the general laws of this State for the

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formation of telegraph companies; and being organized and incorporated under that general law was, consequently, in the language of the Constitution (Art. 4, Sec. 31), "formed under that general law," and can in no just sense be said to have been "created by special act."

It follows, then, that at the time when the transfer was made by Allen & Burnham, the plaintiff had a legal existence, and was a regularly incorporated body, having previously been "formed" or "created" in the regular way pointed out by law.

The prohibition of the Constitution extends only to the "formation" or "creation" of corporations; and consequently after such "formation," or "creation," every corporation becomes at once clothed with all the rights, powers, privileges, and attributes of corporations, as known and recognized in law, unless restricted by the Act of Incorporation. But the act under which the plaintiff was incorporated, placed no restrictions upon the plaintiff which would debar it from taking the rights of Allen & Burnham. (See Compiled Laws, 300, *et seq.*) Sec. 148, p. 301, declares the plaintiff to be a body corporate, and thus invests the plaintiff with all the powers and rights of a body corporate, for the purpose of "constructing a line or lines of telegraph through this State," (Sec. 146, Compiled Laws, 300), "or from and to any point within this State." (Id.)

The plaintiff, after being duly "formed," or "created," had the right and power, as a necessary incident to carrying out the purposes of its creation, to acquire such rights from the State itself; and if from the State itself, most clearly from any person or persons to whom the State had legally transferred such right.

The statute (Comp. Laws, 301, Sec. 149) expressly empowers the plaintiff "to purchase, receive, and hold, and convey such real estate" "as may be necessary for the convenient transaction of the business, and for effectually carrying on the operations of such association." Thus the statute, instead of restraining the Common Law powers of the plaintiff, expressly concedes them, and in terms confers upon the plaintiff the powers which it would have possessed without the statute. And corporations, unless restrained by their charters, have an indefinite right of purchase; and so rigidly is

this rule carried out that, where the restraint is impaired by a proviso, as "provided the lands be necessary for manufacturing purposes," it is incumbent on the party objecting to the purchase, to bring the case, by proof, within the proviso. (*Ex Parte Peru Iron Co.*, 7 Cow. 540; *Dockery v. Miller*, 9 Humph. Tenn. 731.)

VI. The defendant has no right to question the validity of the conveyance and transfer to the plaintiff. If the plaintiff has transcended its powers, that is a matter between itself and the State, and cannot be called in question by a third person; it is a matter wholly between the directors and stockholders, and between the stockholders and the Government. (*De Ruyter v. St. Peters Church*, 3 Comstock, 238; *Arthur v. The Com. and R. R. Bank of Vicksburgh*, 9 Smedes & Marsh. 394; *Robins et al. v. Embry et al.*, 1 Smedes & Marsh. Ch. 268, 269.)

The plaintiff became organized as a corporation. It then took the transfer from Allen & Burnham. The plaintiff then went on and performed the contract of Allen & Burnham; built the telegraph, and paid, and has continued to pay into the treasury of the State the amount stipulated in the Act of May 3d, 1852. The question as to the validity of the transfer from Allen & Burnham to the plaintiff, can only arise between the State and the plaintiff. And the State, by accepting the payments as stipulated by the Act of May 2d, 1852, is estopped from denying or questioning the legality of the transfer to the plaintiff. (1 Parsons on Con. 118; *Selma and Tenn. R. R. Co. v. Tipton*, 4 Ala. 808; *Dezell v. Odell*, 3 Hill, 219, 221; 1 Greenl. Ev., Sec. 207.)

Crocket, Baldwin, and Crittenden, for Respondents.

The main question in this case is as to the capacity of the plaintiff, a corporation created under the general law, to take the special and exclusive privilege conferred by the Act of May 3d, 1852, upon Allen & Burnham.

We contend that a corporation created by general act can take only those powers and rights given by the general law; and that it cannot take any exclusive privileges which are given by special act, either directly to itself, or, in the first instance, to individuals, and then assigned by those individuals to such corporation. We

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do not mean to say that a corporation may not take property necessary to the carrying on of its business, for this is given by the general law; but that it cannot, either originally or derivatively, take to itself a franchise or exclusive privilege. For example: We contend that though it might be in the power of the Legislature to grant a ferry franchise to A, which, by the terms of the act, is exclusive in its nature, yet that it could not grant such exclusive privilege to a corporation formed for running a ferry. This brings us to consider the meaning of those clauses of the Constitution in regard to corporations.

The Constitution seems to be jealous of corporations. It feared the influence of accumulated capital when associated with any special privileges. It adopted the democratic idea that monopolies of all sort were odious, and that exclusive privileges in the hands of corporations gave them unfair advantages over individuals. Hence, while the Constitution allowed to corporations the benefit of organization and of associated capital, it also sought to prevent the evil of creating a monopoly, or increasing their powers by the aid of any special or exclusive privileges. It intended to create, as far as practicable, equal right in all the people of the State to participate, if they chose, in the advantages to be derived from their voluntary association as corporators; giving to no one, over others, governmental or political patronage or favor. Those franchises which belong to Government, and which individuals cannot get except by grant from the political power—which are a part of the sovereignty—it withholds from corporations, or, if it does not withhold them, can only give them by some general law, which applies, of course, to all alike. If the exclusive privilege owes its existence necessarily to a special act, such a special act can no more inure to the benefit of the corporation created under the general law, than could the corporation be created out and out by special act; for we see no difference between the corporation created in part, or having its functions, powers, or faculties given in part by special act, and its being indebted for its whole existence to special act.

The constitution declares that "corporations shall not be created by special act; but may be created by general law." Now what is the meaning of this clause? Was it merely intended to prescribe

a mode by which acts of incorporation were to be passed—a mere regulation of the forms of legislation? We think not. The very gist of the inhibition and direction was a restriction upon the powers and rights of corporations. The provision as to their creation by general law was designed to insure equality and uniformity in the powers of these bodies. It was supposed that the general law was to serve as a general charter of these corporations; to prescribe the extent of their powers; to comprehend all corporations of like kind, giving all the same powers and rights. There was to be no partiality and no distinction between them. All were to owe their existence to the same instrument, enjoy the same rights, and to be subject to the same restrictions and responsibilities.

According to the argument of the other side, if the corporation be once formed under the general law, it can be the recipient of any privilege, power, or faculty, by special act. A railroad corporation could have imparted to it, by special act, the exclusive privilege of carrying passengers and freight by land between any two points, or possibly throughout the State. A telegraph line, as in this case, could have granted to it, in effect, the telegraph business between the great points in the State claimed for it. And what would have been gained by the clause of the Constitution? The Legislature would only have to pass a general law, like that on the statute book; and then having got the corporation formed under the general act, make, by special act, the favored corporation the depository of all the special powers or exclusive privileges which are given in other States where no such clause exists. The powers of corporations would not be affected at all by our Constitution, but only the mode of giving them. The general act might contain nothing except the bare skeleton of a corporation, while the special act, coming directly after, might clothe and arm the corporation, which was thus provided for, with all manner of extraordinary powers and exclusive privileges. Monopoly after monopoly might be engrafted upon the corporation established under the general law. We can see no difference between creating a corporation by special act, and giving it exclusive privileges by special act; nor is there any difference, in this respect, between granting directly to it special privileges—giving, as in this case, a monopoly

—and giving to a private person this monopoly, and allowing that person to assign the monopoly to the corporation. In either case it would be a mere evasion of the constitutional inhibition—a direct contravention of the policy of the Constitution in this important matter.

Constitutions being necessarily general in their terms, are to be construed, not, as penal laws, with strictness, but liberally, in advancement of the obvious policy which they establish or intimate. The clause in question was evidently designed—as not only the “Debates,” but its own terms and context show—as something more than a direction to the Legislature as to the process of passing acts. The Convention supposed that when the Legislature were denied any other mode of creating corporations than by a general law, it would of necessity result, that special privileges could not be conferred upon any one or more of them; that the general law would stand in the place of their charter, it applying to all alike; that the effect would be to deny to any, whatever was not granted to all. Looking to the clause, therefore, in connection with the well-known facts which existed at the time, and to the political questions which gave rise to the provision, it seems to us clear that the policy which the Constitution meant to establish was, to divest incorporations of the capacity to hold any exclusive privilege whatever which was the subject only of special legislative grant; that where a particular privilege could only be conferred by special act, then no one corporation could take it, either immediately from the Legislature or mediately. We do not say that the Legislature could not, by the general law (or possibly otherwise), provide that every corporation of a kind like this should have a right of way over the State’s land, etc., exclusive right, etc. (but this provision, to be constitutional, would have to comprehend all corporations of the same class); but we contend that the Legislature could not, by special act, give a particular corporation this right, any more than it could entirely create a corporation by special act. The learned counsel say that this exclusive privilege is property, and that the Telegraph Company has the right to hold property of this kind—it being necessary for the convenient transaction of its business, etc.

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We dispute that this exclusive privilege, however profitable, is necessary, within the sense of the law, to the transaction of its business. So in the same sense would be an exclusive privilege to do all the telegraphic business of the State. Our answer is, that whether this privilege be property or not, it is, at the same time, a special exclusive right to monopolize a particular species of trade between the important commercial points of the State; a right given by special act of the Legislature, and therefore creating this a special corporation, for all practical purposes, when the Constitution meant, by requiring corporations to be created under general law, to make it of like kind and character with other corporations of the same class. The exclusive privilege is the main thing—the corporate character comparatively nothing. The specialty is everything—the general corporation nothing. The very evil the Constitution meant to guard against is illustrated vividly in this case. For here we have a corporation, with the benefits of associated capital and the convenience of the corporate character, holding a monopoly for years of the business in an important branch of trade, which, in its effect, is nearly equivalent to the entire control of the telegraphic business of the whole State. And it claims all this, directly or indirectly, through legislative acts. Now what more could this corporation do or have, if there was no clause in the Constitution restrictive of corporations? In what respect, if this be legal, is a corporation any more restricted in its powers in California than elsewhere? it is true that the corporation cannot be created or formed by or through a special law; but this is so much the better for it—special privileges and powers can be afterwards given by special act; or if not given directly to the corporation, it would always be easy to find some convenient *locum tenens*; or, if not in this way, to buy up such franchises as might be acceptable. In this way the operations of the corporation would be more insidious, easy, and unsuspected.

The case of *Lowe v. Marysville* (5 Cal. 216) establishes, we think, the principle for which we contend. Marysville was a municipal corporation, and the mayor subscribed for stock in a steam navigation company under authority of an ordinance. The validity of this subscription—being for an object not within the municipality

—was brought in question. Two points were made: first, on the construction of the second section under which the right was claimed—the appellant contending that the section did not authorize the subscription; second, that if it did, the act was unconstitutional. The ground of unconstitutionality was, that the enterprise was not one of those municipal or police objects which a municipal corporation, under the constitution, was authorized to act upon. The authority, therefore, was special, and the Court decided both points. The Chief Justice said: “If we are right in assuming that the powers of municipal corporations must be confined strictly to police or governmental purposes, and that the term was employed in this sense in the Constitution of the State (as appears from the Constitutional Debates as well as the general acceptance of the words), then it follows that the power thus given by the second section could not be conferred by special act; for it would have been in violation of the Constitution to create an incorporation by special act for other than municipal purposes, it follows that it would be equally unconstitutional to confer special power on a corporation already created. In other words, it would be doing by two acts that which the Legislature could not do by one; and corporations for almost every purpose might be created by special act by first incorporating the stockholders as a municipal body.” So here, there would be by the assignment of the benefit of a legislative act granting a special power of right, a conferring of a special power (or privilege) to a corporation already created; it would be doing by two acts what could not be done by one; for if a law were passed directly creating this corporation with this privilege, it would be unconstitutional; and the result would be that a corporation might in effect be created by special act, since by a mere organization under the general law, it might become the recipient of faculties, rights, powers, and privileges, which were conferred, and could only be conferred by special act—the whole character of the corporation so entirely changed by the special privileges of which it was the assignee, that the effect would be in every material respect the same as if the whole corporation were created by special act. The uniformity and equality which the general law was designed to give to all corporations of the same

class would be broken down, the general likeness destroyed, and every mark and characteristic of a peculiar and specially-created artificial being impressed on the favored body.

It is evident that the late Chief Justice attached the most liberal meaning to the term "create," when applied to corporations; that this word stood, in his estimation, for more than the mere birth or first shape of the body; and comprehended a forming of all the elements, parts, and faculties of this entity. It is apparent that no part of the framework of the corporation, or of its powers, rights, or privileges, could be given, in his opinion, by special act. That when the Constitution prescribed that the corporation should only be created by general law, merely the powers, rights, and privileges which are given to them by that general law should attach to them.

We regard the questions involved in this case as of the utmost public importance. They go far to settle the entire constitutional law of corporations in this State. The consequence of the decision in favor of the appellant, will be unquestionably, as a practical thing, to give to every corporation in this State all the powers possessed, or which could be conferred by the laws of any State in the Union or England. Though exclusive privileges may constitutionally be conferred by the Legislature on individuals, the power is of little danger, because to render it dangerous or to create a monopoly, it is necessary, in the condition of the country, that many should associate together—the capital of one or a few being insufficient for "grand enterprises." But if it be conceded that all that is necessary to secure this concentration of capital, is to grant exclusive privileges or franchises to one man or a few, who may then assign them to a corporation, the work is at once accomplished; and the Legislature may be got to confer enormous privileges on a few favorites. A corporation may be formed to make a wagon road over the mountain passes or through the State; and a special act giving to A B C the exclusive right of transporting goods will be ready awaiting the formation of the corporation under the general law, to receive the privilege.

An exclusive privilege of fishing on the sea-shore may be lodged in D to await only the forming of a corporation by his copartners

to receive the privilege. Ferriage over the Bay of San Francisco may be suffered by special act to be carried on exclusively by E, and E straightway, of course, conveys the franchise to a corporation, preordained to be established to get the privilege. And so of every thing else which may be the subject of legislative favor, however that favor may chance to be conciliated.

Every one knows that it is much easier to procure a grant in favor of a private person than of a corporation; and, therefore, if the doctrine advanced be true, the restriction in the Constitution will amount practically, to an enlargement of the powers of corporations.

This case is a good illustration: "Lines shall not be constructed, or offices established so as to do business between the cities aforesaid." In other words, Allen & Burnham shall have the sole privilege of doing the telegraphic business between the leading commercial points of the State for fifteen years; a clear and enormous monopoly—an exclusive privilege—purely statutory; and this transferred soon after to the appellant. Then no one is allowed to construct a line within half a mile of the line (in its whole course) selected by Allen & Burnham.

We doubt, independently of the grounds just taken, whether the Legislature has any right to grant this wholesale monopoly. It seems to us to be against common right. We shall not dispute the right to grant a franchise of ferries, bridges, roads, etc.; but would it be tolerated at this day that the Legislature should grant all ferries in a county—all bridges on or over a long river—all roads in the county or State, to A, B, or C? Suppose the Legislature should grant a right of transporting all freight between two leading points in the State to A would the grant not be void as in restraint of trade or against common right? And what is the difference in principle between granting a right to convey all messages by telegraph; between doing all the wagoning and all the telegraphing? Or suppose there was no national postal system; but the conveyance of letters was open like other business to competition, would a law which gave all the carriage of letters between San Francisco and Sacramento to A as his exclusive privilege, be constitutional? Is such a privilege as this a franchise grantable

by the sovereign; or is it not a mere monopoly, void when granted as against the general right of the people and the whole spirit of the Constitution? Moreover what power had the Legislature to grant the right to use the streets of San Francisco, Sacramento, etc.? Those streets do not belong to the State, they are not highways of the State; but mere easements, the fee of the land being either in the city as proprietor, or in the individuals holding the soil; the use of which streets the owner may have dedicated to the public as such—the Plaza—for example. The State might by virtue of its sovereignty, exercise some public control over such streets, to make or keep them subservient to the uses for which they were dedicated; but we deny that it could pervert them to other and foreign uses for the benefit of private citizens, or their enterprises. It might also take it by right of eminent domain, but only by and after making compensation.

We apprehend it could not give an exclusive privilege to A to run his telegraph line over B's land, or establish his stations there; or if it did attempt it, that C could grant to D the right to run his lines over his (C's) own lands, and that D would not be affected by any such unauthorized exercise of authority in favor of A. In answer to the argument that whether the appellant could take this privilege or not, the respondent could not object, we respectfully suggest that this argument, if it could apply in any case, could not in this. This is a case of title, and of title under statute, and the rule is well settled, that whenever a statutory right is claimed, the title must be clear before the Court will interfere by injunction.

Geo. R. Moore, also, for Respondents.

I. The Act of May 3d, 1852, is in direct conflict with Sec. 31 of Art. 4 of the Constitution. This section provides that corporations may be formed under general law, but shall not be created by special act except for municipal purposes; and Sec. 33 of the same act says: "The term corporation, as used in this article, shall be construed to include all associations and joint stock companies having any of the powers and privileges of corporations not possessed by individuals or partnerships." Allen & Burnham were a corpora-

tion within the meaning of this section. They were associated together for the purpose of constructing a telegraphic line and carrying on the business of telegraphing between the points named, and possessed powers and privileges which individuals and partnerships did not and could not possess. Before the passage of this Act of May 3d, Allen & Burnham did not possess the power and privileges of constructing a telegraph line between the points named or the right of way along the route. They did not possess the franchise which the act conferred. All these powers and privileges were acquired by the act. The Constitution itself fixes the necessary elements of a corporation, and we are not permitted to go to the common law or elsewhere for a definition. If an association or joint stock company possesses any of the powers and privileges of corporations not possessed by individuals or copartnerships, it is a corporation within the meaning of this article. Now as we have shown, Allen & Burnham did not possess powers and privileges such as corporations alone enjoy and which were denied to individuals. Besides, Allen & Burnham had all the necessary prerequisites to constitute them a corporation at common law: 1st, the name by which they received the grant was a corporate name to all intents and purposes; but if not, then a corporate name could have been assumed by implication. This is well settled. (1 Black. Com. 474, 475; 1 Kyd on Cor. 234-253; 2 Kent's Com. 292.)

The act provides for succession. The grant is made to Allen & Burnham, and their assigns and their successors. They have the power to acquire, hold, and grant all the property real and personal that may be necessary to carry into operation the object of their organization. They have the power to contract obligations and to sue and to be sued in the corporate name which they already possessed, or which they had a right to assume. These, says Mr. Kyd in his work on Corporations (vol. 1, pp. 13, 69, 70), are the essence of corporation.

Mr. Blackstone says, that the first five incidents mentioned in the text are inseparably incident to every corporation, aggregate, (1 Black. Com. 475)—that is, they exist as a matter of course without being specified in the grant. "The general rule is that every corporation has a capacity to take and grant property and to contract

obligations; but these general powers, incident at common law, are restricted by the nature and object of the institution, and in pursuance thereof it may make all contracts necessary and useful in the course of the business it transacts as means to enable it to effect such object, unless prohibited by law or its charter, and to attain its legitimate objects it may deal precisely as an individual who seeks to accomplish the same end." (*Barry v. Merchants' Exchange Co.*, 1 Sanf. Ch. 280; 9 Paige, 470; 2 Hill, N. Y. 265.)

We say then, that if the Act of May 3d had force and validity enough to accomplish anything, it constituted and created Allen & Burnham a corporation within the meaning of the Constitution and also by the rules of the common law.

II. But suppose the act were valid in the hands of Allen & Burnham on the ground that they were not a corporation, it became absolutely void when the franchise created by it was assigned to and possessed by a corporation organized and existing under the general corporation law. If an arrangement of this kind could be sustained by the Courts the Legislature might create every species of monopoly in the face of the Constitution. Let us examine the *modus operandi*. A number of persons organize for some purpose under the general law. Two or three of the corporation as individuals apply to the Legislature for exclusive powers and privileges which, when granted, are immediately assigned to the company, and thus the Legislature do by two acts what they could not constitutionally do by one. The Constitution forbids the creation of a corporation by special act, but if the appellant be correct a corporation already in existence under the general law may take and hold by assignment as many special and exclusive privileges and the benefits of as many special acts as may be desired. The Constitution, the Courts, justice, and common sense proclaim a different rule. The sacred magna charter of our country is not thus to be disregarded and trampled upon. The equal rights and privileges secured to all are not to be thus trifled with. This is not a new question; it has been directly passed upon by this Court in *Low v. City of Marysville* (5 Cal. 216), where our position is fully sustained.

The great object of the framers of our Constitution was to restrict legislation to such limits that no monopoly could ever exist

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in this State in any branch of industry or business. If it were necessary for us to go outside of the Constitution itself to ascertain its meaning, the debate in the Convention upon this point would afford us all the light required, and furnish us a guide for correct interpretation. But the language employed is so plain and comprehensive that extraneous research is wholly unnecessary. If such extraordinary partiality as the act in question exhibits were to be tolerated, in spite of the constitutional inhibition, the fearful evils which have been the bane of other States would be fastened upon us, and the boasted equality which we had believed to be ours forever would in a moment be swept away. Privileged monopolies would grow up to oppress the many, while the favored few would become opulent in the enjoyment of unjust and partial legislative grants.

III. Plaintiff had not the power to take an assignment of Allen & Burnham's franchise. At the time of this assignment or purchase, plaintiff was a corporation organized and existing under the general corporation law, and could exercise no power not conferred by that act. Under this incorporation act plaintiff was authorized to purchase and hold any real and personal property that might be necessary to carry into effect the objects of the organization. Now what did plaintiff purchase and obtain from Allen & Burnham? It was certainly neither real nor personal property, and consequently not within the specified character of property which plaintiff was permitted to purchase. In the case of *De Witt v. Hays* (2 Cal. 463) this Court said: "The right of the plaintiff in the premises is simply the right to collect wharfage and dockage for a certain term of years, and is neither real nor personal property, but a franchise, or incorporeal hereditament—an uncertain profit arising out of the realty." The right granted to Allen & Burnham, so far as its character as property is concerned, is similar to a ferry privilege.

"A ferry is a franchise and is not the subject of levy, sale, or delivery." (*Warren v. Thomas*, 5 Cal.) Now has the plaintiff the right to purchase a franchise which we have shown is neither real or personal property, and that too when it was not necessary to carry out the objects of its organization; in other words, without any express or implied authority could the plaintiff purchase, hold,

and exercise the powers, rights, and privileges of another distinct and separate corporation?

"A corporation cannot contract unless the charter of incorporation enables it to contract, and in that case it is restricted to the mode and subject matter prescribed." (*N. Y. Insurance Co. v. Ely Parsons*, 5 Con. 660.) A corporation has no power except what is given by its incorporating act, either expressly or as incidental to its existence. (*Head v. Providence Insurance Co.*, 2 Cranch, 127; *Dartmouth College v. Woodward*, 4 Wheat. 636; *Beatty v. Knowler*, 4 Pet. 152; *Smith v. Morse*, 2 Cal. 524; *Lowe v. The City of Marysville*, 5 Id. 216.)

Then if, as we have seen, plaintiff had no power under its incorporation act to purchase a franchise, the assignment from Allen & Burnham was invalid and of no binding effect as against respondents.

Geo. Cadwallader, for Northern Telegraph Co. Respondent, in addition to the points urged by his associates, argued:

I. The plaintiff derives its existence from the general Incorporation Act of April 22d, 1850, which required of the persons proposing to form a corporation to designate the points to be connected and the general route of the telegraph line between such points.

The one hundred and fiftieth section of this act is in the nature of a direct grant of the right of way for such corporations between the points indicated in their certificate, and the one hundred and fifty-second section affords to such corporations protection from trespassers, etc. This act (not repealed) permitted as a matter of course the creation of a corporation to do business between San Francisco and Marysville, and endowed such corporation with the privileges conferred by the act, and above all other things the right to do business between those points. The general law was passed April 22d, 1850, and the Allen & Burnham grant on the third of May, 1852. The first declared it lawful for corporations organized under its authority to construct and operate lines of telegraph between San Francisco and Marysville. The latter declared that no persons but Allen & Burnham should have that right, and section second of the last act says: "That no existing law shall be so construed as to conflict or interfere with the provisions of this act."

Now consider the Allen & Burnham grant constitutional and it must follow that the law of May 3d, 1852, repealed so much of that of April 22d, 1850, as permitted the organization and operation of telegraph companies to do business between San Francisco and Marysville by the way of San José, Stockton, and Sacramento; and that the plaintiff on the first day of June, 1853 (the time stated in its complaint), could not become a corporation to do business between those points under the general law of April 22d, 1850, because so much of the law as permitted the incorporation of telegraph companies between those points had been repealed by the Allen & Burnham grant of May 3d, 1852, and not being a corporation could not buy the Allen & Burnham grant nor maintain this suit.

II. The construction and operation of a telegraph between San Francisco and Sacramento by the respondent was a lawful business, and the Legislature was without the power to confer upon Allen & Burnham the exclusive right to do such business between those points.

The Norwich Gas Light Co. v. The Norwich City Gas Co. (25 Conn. 19) is directly in point. In this case the Court observes, against an exclusive gas grant, that "the manufacturing of gas for the purpose of lighting buildings is a lawful business." As we say in this case, the right to communicate by telegraph between different points in this State is a natural right that cannot be disposed of by the Legislature.

CROCKER, J. delivered the opinion of the Court—COPE, C. J. concurring specially.

This is an appeal from an order dissolving a temporary injunction, which was granted and dissolved upon the complaint alone. The complaint alleges that on the first day of June, 1853, the plaintiff was duly incorporated under the general Corporation Law of this State, passed April 22d, 1850, for the purpose of constructing and operating an electro-magnetic telegraph line from the City of San Francisco to the City of Marysville, by the way of San José, Stockton, and Sacramento; that immediately thereafter Allen & Burnham assigned to them all the rights and privileges

granted to them by the Act of May 3d, 1852 (Statutes of 1852, 169); that they afterwards constructed and put in operation the said line of telegraph at an expense of \$250,000, and have in all respects complied with the conditions of said act; that the said Alta California Telegraph Company is a corporation formed under the Act of 1850, and has, in concert with the other defendants, constructed a telegraph line between San Francisco, San José, and Sacramento, have established offices in said cities, and are transacting a telegraph business thereon: that defendant's line runs in a large part of its course within less than half a mile of plaintiff's line; that they have suffered great injury thereby—in the sum of two hundred and fifty dollars; that the defendants intend to continue the business; that it is utterly impossible for the plaintiff to ascertain and prove the amount of business done by the defendants, and the injury would therefore be irreparable, and prays for a perpetual injunction against the defendants, restraining them from doing any telegraph business between said cities.

The case presents the following questions for our adjudication: 1st, is the Act of May 3d, 1852, granting certain exclusive privileges to Allen & Burnham, constitutional; 2d, have the plaintiffs the power or right to purchase, hold, and enjoy these exclusive privileges? The determination of these matters involves some important constitutional questions which have received very little judicial consideration, and we must therefore mainly rely upon those general rules of constitutional construction which are applicable to questions of this character. One rule is that it is competent for the Legislature to exercise all legislative powers not forbidden by the Constitution, or delegated to the National Government, or prohibited by the Constitution of the United States; and that an Act of the Legislature is to be held as void only when its repugnance to the State or National Constitution is clear beyond a reasonable doubt. (*Cohen v. Wright*, 22 Cal. 295, and cases there cited.)

1. The first point is, whether the Act of May 3d, 1852, is repugnant to the Constitution. The first section of that act grants to Allen & Burnham, or their assigns, the right and privilege to construct and operate a telegraph line from San Francisco to Marysville by the way of San José, Stockton, and Sacramento, with the

right of way over any lands belonging to the State, and on any streets, roads, or highways, and across any stream, for the term of fifteen years, prohibiting all persons from locating or constructing any telegraph line within half a mile of the line constructed by them, except in or near a city. It provides that local side lines may be constructed, "*but lines shall not be constructed, nor offices established, so as to do business directly or indirectly between the cities aforesaid.*" It also contains certain conditions imposed upon the grantees. Sec. 2 provides that "no existing law shall be so construed as to conflict or interfere with the provisions of this act, provided that the owners of this line shall at all times conform to the present law of the State concerning telegraph companies, so far as it relates to the transmission of messages." The other sections it is unnecessary to refer to.

This act confers certain special privileges, in the nature of a franchise, upon Allen & Burnham. Franchises are privileges derived from the Government, vested either in individuals or private or public corporations, and are of various kinds, such as the privilege of exercising the powers of a corporation, of having waifs, wrecks, estrays; the right to collect tolls on a road, bridge, ferry, or wharf; the privilege of fishing, or taking game, and numerous others which might be referred to. In England a large class of franchises exist which are unknown to our law, but some are of more extensive use here than there, especially corporate franchises.

The grant of a franchise is in the nature of a vested right of property; subject, however, in most cases, to the performance of conditions and duties on the part of the grantees. They generally involve important duties of a public character, often onerous upon the grantees. They are necessarily exclusive in their character, otherwise their value would be liable to be destroyed, or seriously impaired. So long as the grantee fulfills the conditions and performs the duties imposed upon him by the terms of the grant, he has a vested right which cannot be taken away, or otherwise impaired by the Government, any more than other property. And even though the grant does not declare the privilege to be exclusive, yet that is necessarily implied from its nature. In the grant of a bridge, ferry, turnpike, or railroad, it is implied that the Govern-

ment will not, either directly or indirectly, interfere with it so as to destroy or injure it. Franchises are derived entirely under grants from the Legislature, either by general or special laws. There is a large class of special privileges conferred upon public bodies, or private individuals, for numerous purposes relating to the public interest, which are franchises. The most common known to American law are those of corporate and banking privileges; and they have multiplied beyond all precedent under the system of general incorporation laws, by which these privileges, instead of being conferred upon a few, are open to all. The nature and character of franchises have been most clearly defined in 3 Kent's Com. 599, etc.

The law of this State regulating ferries and toll-bridges gives the owners an exclusive privilege by prohibiting the establishment of any other ferry or bridge within one mile. (Wood's Dig. 460.) And this Court has always protected the parties in the enjoyment of these exclusive privileges. (*Hanson v. Webb*, 3 Cal. 237; *Norris v. Farmers and Teamsters' Co.*, 6 Id. 594; *Chard v. Stone*, 7 Id. 117.) In many cases, however, the law conferring franchises, such as turnpike roads, does not confer any exclusive privileges, and they are then open to competition. (*Indian Cañon Road Co. v. Robinson*, 13 Id. 519.) This question, whether the privilege shall be exclusive or not, depends entirely upon the wise discretion of the Legislature. The granting of franchises, whether exclusive in their character or not, is one of the ordinary powers of legislation, and as such can be exercised by the Legislature of this State; controlled, however, by the restrictions imposed on it by the Constitution.

The next subject of inquiry is, what constitutional limitations have been imposed upon this general power. One is that "corporations may be formed under general laws, but shall not be created by special act except for municipal purposes. All general laws and special acts passed pursuant to this section may be altered from time to time or repealed." (Const. of Cal. Art. 4 Sec. 31.) There are other provisions defining the meaning of the term "corporations," regulating the liabilities of their members, prohibiting and requiring the Legislature to prohibit by law, all persons or corporations from exercising the privileges of banking, or creating

paper to circulate as money. Here are plain and explicit limitations upon the powers of the Legislature, by which they are positively prohibited from conferring the special privilege of banking or issuing paper money upon any person or corporation, and from creating a body with corporate privileges by special law except for municipal purposes. The object and design of these limitations are evident to all. The evils flowing from the issue of paper money by banks are too well known to need comment. The limitation upon the creation of private corporations by special laws closed a prolific source of legislative corruption. In other States, where no such restraint exists, corporate privileges can only be secured by special grant from the Legislature at great expense and delay. No good reason existed why the right should not be enjoyed by all who desired, and the framers of our Constitution wisely removed the difficulty by requiring that these privileges should only be obtained under general laws, open to all citizens upon equal terms.

These are all the constitutional limitations upon the power to grant franchises, and it is clear they do not prohibit the granting of the privileges vested by this act. From the fact that no other limitations are imposed, it is evident that it was the intention to leave the Legislature free to exercise its discretion in all other cases. It is contended, however, by the respondents, that the clause prohibiting the creation of private corporations by special law does in some way render this law unconstitutional, but we cannot see any force in their argument on this point. It is certain that the act does not in any sense make Allen & Burnham a corporation. The special privileges which it confers upon them are entirely distinct from those powers which are the distinguishing features of a corporation. That privileges of a like character are sometimes conferred upon corporations does not make these individuals a corporation.

Much is said about the odious character of monopolies, in which we entirely agree, but such arguments should properly be addressed to the Legislature, with whom the power is vested. We cannot deny the existence of the power to grant special privileges without overturning the legislation of centuries and the whole system of jurisprudence upon the subject of franchises and vested rights of

property. We therefore hold the act in question to be constitutional.

2. The next, and most important question is whether the plaintiff, a corporation, had the power to purchase and hold the special privileges granted by the act to Allen & Burnham. It is not disputed that those grantees had power to sell and convey, for the act specially makes the grant to them, or "their assigns," thus clearly making the privileges assignable. But it is urged that the clause in the Constitution which prohibits the Legislature from creating a private corporation by special act, equally prohibits them from conferring any powers or privileges of a corporate character by special law; and that all the powers and privileges which a corporation can exercise or hold must be derived from a general law, applicable alike to all corporations.

It is clear that the Constitution prohibits the Legislature from "creating" corporations by special act, except for municipal purposes; and it is equally clear, that this prohibition extends only to their "creation." There is nothing in the language used which either directly or impliedly prohibits the Legislature from directly granting to a corporation, already in existence and created under the general laws, special privileges in the nature of a franchise, by a special act, or prohibiting a corporation from purchasing or holding such franchises, which may have been granted to others. To give the Constitution any such effect, we would be compelled to interpolate terms not used, and which cannot be implied without a perversion of the language employed. To give it such a construction, we would have to make it read thus: "*Corporations may be formed, and other franchises and special privileges granted, under general laws, but shall not be created or granted by special act, except for municipal purposes.*" If such had been the meaning intended by the framers of the Constitution, they could have easily expressed it in apt words. The language used by them is clear, and they well knew that it included but one of a numerous class of franchises, the subjects of legislative grant, and that a regulation of one could not by any reasonable implication be extended to others not mentioned.

As we have already shown, a franchise is in the nature of prop-

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erty; it is a vested right, a subject of purchase and enjoyment by all who are capable of purchasing, holding, or enjoying property, by individuals, partnerships, joint stock associations, and also by corporations, when it is of such a character as to be reasonably included in or useful in carrying out the objects and purposes for which the corporation was created. By acquiring such additional franchises, or special privileges, the corporation is not in any sense "formed," or "created," for they are not of the essence of the corporation; nor can it be properly said that it is thereby adding to its "corporate powers;" but even if such was the effect, as it is only adding to the powers of a corporation already created, and not "creating" one, it cannot be said to be prohibited by the Constitution. Any other construction would be most pernicious in its results. It might be of great importance to the public interest to have a road constructed over some difficult mountain pass, and a corporation organized for that purpose under the general law might be unable to procure the means to construct it in view of the great expense, uncertainty, and hazard attending it, without protection for a limited period against competition, and we see no constitutional prohibition against a grant of such exclusive privilege to such a corporation. So a railroad company might be desirous of purchasing and using a valuable invention, relating to the construction or running of their road, but the holder of the patent might be unwilling to sell the right for any part less than a whole State. Clearly the corporation would have the right to make such purchase and hold it for their own exclusive use, or sell to other roads if they saw proper. We use these merely for illustration, but hundreds of others might be suggested where the propriety and necessity would be apparent to all. This power to grant exclusive privileges ought to be exercised with great prudence and sound discretion, and any Legislature abusing it should be held to a strict accountability by the people. The public, however, suffer no greater injury when such grants are made to corporations than when made to individuals. It is no more a monopoly in one case than in the other.

The plaintiffs were incorporated under the "Act concerning Corporations," passed April 22d, 1850 (Statutes of 1850, 347), the first chapter of which contains general provisions applicable to all

corporations; and the sixth chapter relates to the formation of telegraph companies. Sec. 1 of Chap. 1 provides, that "every corporation, as such, has power: * * * 4. To hold, purchase, and convey such real and personal estate as the purposes of the corporation shall require, not exceeding the amount limited by law." Secs. 20-28, inclusive, authorize and regulate the sale on execution of the franchises of certain classes of corporations, with all their rights and privileges. Chap. 6 confers certain special powers and privileges upon telegraph companies formed under it, such as the right to construct lines of telegraph along the public roads, and across waters, and the right to use private property upon payment of a compensation therefor. As a general rule, a corporation has power to make all such contracts as are necessary and usual in the course of its business, as means to enable it to attain the object for which it was created. The creation of a corporation for a specified purpose implies a power to use the necessary and usual means to effect that purpose. (Angell & Ames on Corporations, Sec. 271; *Union Water Co. v. Murphy's Flat Fluming Co.*, decided at the present term.) I hold, then, that the plaintiffs, as a corporation, were capable of receiving a grant of these special privileges directly from the Legislature, and of purchasing them from the grantees.

It is urged, however, that the provision in the Act of May 3d, 1852, that "no existing law shall be so construed as to conflict or interfere with the provisions of this act," operates as a repeal of the general Corporation Law, so far as that law permits the formation of telegraph companies to construct lines between the cities named in the Act of 1852, and, therefore, the plaintiffs, being organized to construct such a line, are not a corporation, and have no power to purchase or hold the privileges granted to Allen & Burnham. This clause has more the effect of a rule of construction than of a repeal of any existing law. The evident meaning is, that the privileges of the right of way, etc., granted to telegraph companies formed under the general law, shall not conflict or interfere with the special privileges granted by the act. There is nothing in it prohibiting or taking away the right of forming corporations to build lines between those cities; but if formed, they must take

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subject to the prior exclusive privileges of the grantees, who might waive their rights, or abandon or forfeit them, or transfer the whole or a part to such corporations. To give it the effect claimed, would require a more clear and explicit expression of legislative intention than is contained in this clause.

The Constitution of Indiana ordains that "Corporations, other than banking, shall not be created by special act, but may be formed under general laws;" and it was held that "the Constitution of the State authorizes the Legislature to create corporations, and imposes no limit as to the powers to be conferred on them; no clause confining their action to objects entirely disconnected with anything outside the corporate limits." (*Aurora v. West*, 9 Ind. 85.) The Legislature may give additional powers, from time to time, to corporations; and acts of the corporation, in pursuance of such authority, are binding. (*Gifford v. New Jersey Railroad Company*, 2 Stockton's Ch. 171.) And special powers and privileges may be conferred upon existing corporations. The words "create a charter," used in the Constitution, mean to make a charter which never existed before. (*C. P. and A. Railroad Co. v. Erie*, 37 Penn. State, 380.) Under a similar clause in the Constitution of New York, relating to banks, it was held that an act declaring that a certain bank should be deemed to be a valid corporation and to have been duly organized, notwithstanding any error, irregularity, or insufficiency in the proceedings organizing it under the general law, did not *create* a corporation, but only remedied defects in the organization of one already created, and it was therefore constitutional. (*Syracuse City Bank v. Davis*, 16 Barb. S. C. 188.)

The Constitutions of Michigan, Iowa, Indiana, and Ohio contain similar limitations upon the mode of creating corporations, and the statutes of those States, as well as our own, afford numerous instances of the grant by special acts of particular rights, powers, and privileges to corporations formed under general laws, and the able counsel for the respondent has not cited a single case where the power has been denied by the Courts, except a loose remark made by Chief Justice Murray in the case of *Low v. Marysville* (5 Cal. 214), upon a point not then before the Court. That

remark, as applicable to municipal corporations, which was the case before the Court, might perhaps have been appropriate, but as applied to other corporations is not entitled to any weight. A uniform series of statutes of this character, extending through many years, is a practical exposition of the Constitution, which is entitled to great weight, especially as it has been so long concurred in, and vested rights of great value and importance depend upon them. We do not refer to these facts as affording a rule of construction applicable to this case, for it is only in cases of doubt and ambiguity that such considerations can be resorted to, to determine the proper construction of the Constitution. In this case we deem it clear that the constitutional prohibition can only be applied to special acts *creating* a corporation, and not to those which merely confer special rights, powers, and privileges upon a corporation already created and in existence under a general law.

The exclusive privilege granted by this Act of 1852 have evidently been a burden upon the people of this State, and it is not strange, therefore, that this claim of the plaintiffs has been most zealously contested. It shows the importance of imposing, if practicable, some judicious restraint upon legislative discretion in such matters. It will be found, however, very difficult, if not impossible, to frame a provision which, while securing the people against an abuse of the power, will at the same time leave the Legislature free to exercise it in that large class of cases where the public interests absolutely require laws of that character. An enlightened public opinion, guided by a free and fearless press, is the only and perhaps the best safeguard against abuses of this kind. The order dissolving the injunction is reversed.

COPE, C. J.—I agree with Mr. Justice CROCKER in the conclusion at which he has arrived in this case, and generally with the views expressed by him in his opinion. As to the power of the Legislature to grant the franchise in question I have no doubt; and as to the capacity of the corporation to purchase, the defendant is not the party to object. If the corporation, in making the purchase, has acquired property which, under the law of its incorporation, it had no right to acquire, all that can be said is that it has

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exceeded its powers, and may be deprived of the property by a judgment of forfeiture. The question is one which the State alone can raise. A purchase by a corporation in the face of a positive prohibition would be void; but that is not this case. There was no provision of law forbidding the purchase; and admitting that the corporation had no power to make it, the want of power, in the absence of an express prohibition, is not sufficient to avoid it as to third persons. The rule in such cases was laid down by this Court in *Natoma Water and Mining Co. v. Clarkin* (14 Cal. 544). In that case the corporation was empowered to purchase such property as the purposes of the corporation should require, and it was objected that the property in controversy was not of that description, and that the corporation had no power to purchase it. The Court overruled the objection, saying: "Whether or not the premises in controversy are necessary for those purposes it is not material to inquire; that is a matter between the Government and the corporation, and is no concern of the defendant." The reason of the rule is obvious. As between the parties the purchase is valid, and it must be so as to third persons, until, by a proper proceeding, a forfeiture has been declared. It is well settled that a cause of forfeiture cannot be inquired into collaterally. As mere matter of opinion, it is proper for me to state that I regard the purchase in this case as valid; but in my view of the case, the question is an immaterial one.

PORTER AND ALLEN v. LISCOM.

AN assignee of a judgment, although a purchaser for a valuable consideration and without notice, takes subject to a right of set-off against the judgment existing at the time of the assignment.

Where in the same action two judgments were entered, one for the plaintiff for a certain sum and one for the defendant for a less sum: held, that defendant had a right to set off his judgment *pro tanto* against that of the plaintiff, and that this right could not be defeated by any assignment by plaintiff of his judgment before application for the set-off.

Where a judgment, against which a right to set off another judgment rendered in the same action exists, is assigned, the assignee may be brought into the Court upon a proceeding by petition and motion, and will be bound by an order made therein directing a set-off.

A judgment in favor of a defendant for costs based upon a finding of one of several issues in his favor by the jury, even if erroneous, is not void. While unreversed it is to be treated, for the purpose of set-off, as a valid judgment.

APPEAL from the County Court of Humboldt County.

The complaint in the case of *Allen v. Liscom*, which was tried anew in the County Court on appeal from a Justice's Court, contained two counts, one on a promissory note for one hundred dollars and another upon an account for services rendered for eighty dollars. The jury found the following verdict: "We, the jury, find for the plaintiff one hundred (100) dollars on note, and find verdict for defendant on verbal contract." On the sixteenth day of April, 1861, judgment was entered on this verdict in favor of plaintiff for two hundred and forty-one dollars and fifty-three cents, the amount of the note, interest, and costs; and also that defendant recover of plaintiff two hundred and eight dollars and two cents, "defendant's costs incurred in sustaining action on verbal contract." The subsequent proceedings are sufficiently stated in the opinion of the Court.

S. M. Buck, for Appellant.

I. The proceeding to obtain the set-off is an action, and could only be commenced by filing a complaint and issuing a summons thereon. (Prac. Act, Sec. 22.) The fact that Porter appeared and moved to dismiss was no waiver of his right, to wit: to be brought into Court in the usual and legal manner. (*Deidesheimer v. Brown*, 8 Cal. 339.)

II. The County Court has no jurisdiction of the subject of the action, to wit: to set off a judgment for two hundred and eight dollars and two cents against a judgment for two hundred and forty-one dollars and fifty-three cents. The amount in dispute exceeds two hundred dollars. The Constitution provides that "the District Court shall have original jurisdiction in all cases of law or equity where the amount in dispute exceeds two hundred dollars." (Art. 6, Sec. 6; 5 Cal. 231, 279; 9 Id. 145.)

III. "The facts set forth in the petition are not sufficient to entitle respondent to the relief prayed for. It appears from the face thereof that the judgment sought to be set off is wholly void."

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The County Court in the action of *Allen v. Liscom*, tried therein on appeal from a Justice's Court, in entering a judgment for the successful party for the amount of his verdict and costs, acted by authority and in accordance with law, and the judgment so entered is valid, and the plaintiff in said action or his assignee has a right to enforce the same. (Practice Act, Sec. 631.) But when the County Court of its own motion entered up a judgment in said action for defendant, the losing party, for two hundred and eight dollars and two cents, it acted without authority of law, and therefore such action is wholly void. The Court based its action entirely upon the verdict of the jury. This Court has decided that a jury has nothing to do with the costs. (6 Cal. 286.)

Van Dyke, for Respondent.

CROCKER, J. delivered the opinion of the Court—NORTON, J. concurring.

On the sixteenth day of April, 1861, the County Court of Humboldt County, in a case then pending before it, wherein Allen was plaintiff and Liscom was defendant, rendered a judgment in favor of the plaintiff against the defendant for principal and costs, amounting in all to two hundred and forty-one dollars and fifty-three cents, and in favor of the defendant against the plaintiff for a certain portion of his costs, amounting to two hundred and eight dollars and two cents. On the twenty-fourth day of December, 1861, Allen assigned to one Smiley, "for thirty dollars or thereabouts, a judgment from twenty-five to five hundred dollars (or perhaps upwards of the latter sum) against Charles Liscom in my favor, rendered in the year 1861 previous to May, by the County Court," and on the twenty-fourth day of February, 1862, Smiley executed an assignment upon the same paper of "the above judgment" for thirty-two dollars to Robert Porter. On the fifth day of September, 1862, the defendant, Liscom, filed a petition in said Court setting forth the above facts, and praying that the judgment in his favor be set off and applied as a credit or payment of the amount thereof upon the judgment in favor of the plaintiff, and that upon the payment by him of the balance, which he offered to do, the judgment against

him might be satisfied. Upon the filing of this petition the County Judge ordered that Allen and Porter be notified to appear and show cause why the set-off should not be made. Porter and Allen appeared to the petition, and after a hearing of the matter the Court ordered the set-off to be made, and as the balance due on the judgment in favor of Allen had been paid into Court, ordered a satisfaction of the judgment to be entered, from which order Porter and Allen appeal to this Court.

The power of a Court to set off one judgment against another upon motion is well established, and this power depends mainly upon the general jurisdiction of the Court over its suitors and process. (*Barbour on Set-Off*, 32.) And a purchaser and assignee of a judgment, even for a valuable consideration and without notice, takes subject to a right of set-off existing at the time of the assignment, for an assignee takes subject to all equitable as well as legal defenses which can be urged against the assignor. (*Graves v. Woodbury*, 4 Hill, 559; *Cooper v. Bigelow*, 1 Cow. 206.) And the fifth section of the Practice Act recognizes the same principle. Even if the paper executed by Allen can be considered as an assignment of this judgment, the assignees took with full notice of the right of set-off in Liscom, for the judgment of the latter was rendered in the same action, and formed part of the same entry with that assigned. The proceeding in this case is a motion founded upon a petition, and not an independent action. The action of the Court in rendering the judgment in favor of Liscom for costs is founded upon the verdict of the jury, which found one of the issues in his favor. The judgment, therefore, is not void. If the County Court erred in rendering this judgment, the remedy to correct the error was by appeal, but it forms no valid objection to it on this motion to set off the judgment.

The order allowing the set-off is affirmed.

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SPRING VALLEY WATER WORKS v. SAN FRANCISCO *et al.*

AN act for the incorporation of water companies, approved April 22d, 1858, provided that the mode of proceeding for the appropriation of lands should be the same as that prescribed in Secs. 27-29 of the Act of April 23d, 1853, for the incorporation of railroad companies. In 1861, an entirely new act for the incorporation of railroad companies was passed, not following the order or number of sections of the Act of 1853, which it entirely repealed, and containing new provisions as to their appropriation of lands. In a proceeding to condemn lands, instituted in 1862 by the plaintiff, a water company incorporated under the Act of 1858: *held*, that the course of procedure prescribed by Secs. 27-29 of the Railroad Act of 1853 should be followed, and not those of the new Act of 1861—that those sections were substantially incorporated in the Water Company Act of 1858, and remained a part of the latter, notwithstanding the repeal of the original act.

The existence of a corporation formed under the general State law is proved by its articles of incorporation executed and filed in accordance with the statute.

In incorporating under the general law a strict compliance with all the requirements of the statutes is not essential, and the proceedings will not be held invalid for slight defects or omissions.

The omission or irregular performance of acts relating to the organization of a corporation, can only be investigated in a direct proceeding instituted by the State for that purpose, and not in a collateral action. So, too, of those acts which are not made prerequisites to the exercise of corporate powers but which operate as a forfeiture.

Where an act authorized the incorporation of a water company, and also provided that 3,000 feet of water pipe should be laid down within one year: *held*, that the laying of the pipe within the period mentioned was not a condition of the existence of the corporation, nor was proof of it necessary to enable the corporation to maintain an action or proceeding after the expiration of the year.

The rule that in order to complete the creation of a corporation the charter must be accepted by those incorporating, has no application to corporations formed under general laws.

Where a law is passed for the special benefit of a party, his acceptance of it will be presumed.

Where a franchise was granted to an individual, and his associates, and assigns, and the same act contained a provision requiring the individuals to incorporate themselves within a given time: *held*, that there was no need of any assignment from the individuals to the corporation—that the franchise by operation of law vested in the corporation as soon as it was formed.

In a proceeding to appropriate lands under the railroad law, the commissioners are not required to determine questions of title, nor to report the amount of compensation to which each of several claimants of the same tract is entitled. It is proper for them to report a gross sum as compensation for the tract, leaving the County Judge to distribute it among the several owners.

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The view of the premises required to be made by the commissioners in condemning lands under the Water Company Act of 1858, may be made by them at any time before submitting their estimate and report. It is proper that the view should be had before hearing the evidence.

APPEAL from an order of the County Judge of San Francisco in a proceeding to condemn lands.

The facts are stated in the opinion of the Court.

John Wilson, P. G. Buchan, and M. N. Saunders, for Appellants.

The act authorizing water companies to apply to the County Judge for the appropriation of lands, was passed at the same session (1861) as the law amending the Railroad Act, as to the mode of acquiring land. The mode prescribed by the new act is more consistent with equity and the rights of parties. The Supreme Court having decided that this mode of taking a citizen's property by a corporation without the intervention of a jury was constitutional, the Legislature adopted a mode by which the rights of the owners of property should not be entirely left to the discretion of a County Judge, who could appoint five commissioners, without the right of challenge, and other rights, which are preserved to the citizen on a trial by jury. By the amended Railroad Act of 1861, three commissioners are to be appointed; one to be nominated by the owners of the property, one by the corporation, and one by the County Judge. This forms some check on the County Judge, and tends to preserve the rights of all parties.

It is true that the act under which this proceeding is had was in point of time passed shortly before the amendments to the Railroad Act, but they were both passed at the same session.

Statutes enacted at the same session are to be construed together. (2 Monroe, Ky., 77; 2 Blackford, Ind., 249.)

It is an established rule in the construction of statutes that are in *pari materia*, that they are to be taken together in construing the law in relation to them. (6 Bacon's Abridg. 382.)

If a thing in a subsequent act be within the reason of a former act, it shall be taken to be within the meaning of that statute. (3 How. 556; 12 N. H. 284.)

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The amendments of the Railroad Act in reference to the mode of taking land, we contend, operated as an amendment of the act in reference to water companies taking land, prescribing a new mode of appointing commissioners to appraise the land and assess the damages.

II. The County Judge erred in overruling the objections to the evidence of incorporation of the petitioners, and that they had not shown that they had performed the conditions of the laws under which they claimed to be incorporated, particularly the first section of the Act of 1858, under which act they claimed to be incorporated, nor shown an acceptance of the Act of 1859.

The Act of 1858 (Stat. p. 254), referred to in the petition, conferred on George H. Ensign and his associates, certain powers and rights to lay down water pipes, provided 3,000 feet were laid down in one year from the passage of the Act of 1858 (see Sec. 1st), and provided they incorporated themselves within sixty days from the passage of the act. (See Sec. 8th of the Act.)

They did incorporate themselves on the nineteenth of June, 1858. (See Certificate in Transcript.)

On the eleventh of April, 1859, and before the year expired, the Legislature passed another act, amending the act of 1858, giving George H. Ensign (not the incorporation) two years, instead of one, to lay down 3,000 feet of pipe. The incorporation already created is not mentioned in the Act of 1859. The Act of 1859 added another section, declaring this act should not in any manner interfere with the grants made to other water companies. So far this is an abridgment of the former law, for it contains no such provision.

There is no proof in the record, either offered or given, that the corporation accepted this latter act. It may be that this restriction seriously affects them, and therefore it must be accepted by a majority of the corporators—not the trustees. Trustees are only to administer the law as it existed when they were appointed.

There is no assignment by George H. Ensign of his franchise under the law of 1859 to the corporation. There is no assent by any body shown of its reception, and most surely there is none pretended by the stockholders. That there must be such an accept-

ance shown. (See *Angel & Ames on Corporations*, 53; 13 Penn. 133, case of *Claghorn v. Cullen*.)

The evidence shows they did not put down the 3,000 feet of pipe till a few days before the two years elapsed. (See 1 Greenl. 80.) Corporations must prove their acceptance of a new law, as much as an old one (17 Maine, 442); must show their acceptance of their new charter, or a new law, and their books are the best evidence of this.

III. The commissioners erred in not allowing the parties to establish their respective interests and title in the land sought to be condemned before fixing the amount of damages to be awarded, and the County Judge erred in sustaining on motion for a new hearing the decision of the commissioners.

The old Railroad Act (Sec. 28th) under which this proceeding is had, specifies the mode in which the damages are to be assessed. The petition is to set forth the names of the owners, claimants, tenant, lessee, or incumbrancer, as far as known. This they do, setting forth some as owners and some claiming as lessees. (See petition.) The County Judge is to appoint commissioners to ascertain "the compensation to be made to such owners and persons interested for the taking or injuriously affecting such lands," etc. The commissioners are to ascertain "the compensation proper to be made to said owners and parties interested, or injuriously affected. The Court upon proof that the damages have been paid to the parties entitled to the same, shall enter a rule," etc. It was utterly impossible for the commissioners to ascertain the parties' damages without knowing their respective interests. The damages to a lessee would be entirely different from the damages to an owner.

The jurisdiction of the County Judge is limited and special. When the commissioners make their report, the County Judge either confirms it, or grants a new hearing. There his jurisdiction ends.

IV. The commissioners erred in not viewing the premises after hearing the testimony, as required by Sec. 28 of the Railroad Act, under which they proceeded.

Eugene Liés, for Respondent.

CROCKER, J. delivered the opinion of the Court—COPE, C. J. and NORTON, J. concurring.

The plaintiffs are a corporation organized for the purpose of introducing pure fresh water into the City of San Francisco, and they instituted this special proceeding for the purpose of condemning a certain tract of land to the uses of the company, before the County Judge of the City and County of San Francisco. The parties interested in the property appeared, and on the twelfth day of August, 1862, the County Judge appointed commissioners to report the compensation to which the owners were entitled. The commissioners reported that the owners were entitled to the sum of seven hundred and fifty dollars, which was paid to the County Clerk, and the County Judge rendered a decree adjudicating the premises to the plaintiffs. The defendants moved to set aside the report, and for a new trial, which was denied, and thereupon they appealed to this Court.

The plaintiffs were organized under and in pursuance of an Act entitled "An Act for the Incorporation of Water Companies," approved April 22d, 1858 (Stat. 1858, 218), by Sec. 2 of which it is provided that the mode of proceeding for the appropriation of lands shall be the same as prescribed in Secs. 27–29 of the Act providing for the incorporation of Railroad Companies, passed April 22d, 1853, except that such proceedings shall be had before the County Judge of the county where the lands are situated. In 1861 (Stat. 1861, 228), this Sec. 2 was amended, by providing that, where the County Judge was interested, the proceedings should be before the District Judge. Afterwards, on the twentieth day of May, 1861, an entirely new act was passed for the incorporation of railroad companies, not following the order or number of the sections of the Act of 1853, but changing them throughout, and also repealing the Act of 1853.

The plaintiffs in these proceedings followed the provisions of Secs. 27–29 of the Act of 1853, instead of the revised Act of 1861, and this, it is insisted, was erroneous, and it is claimed that the latter act should have controlled the proceedings. If the new railroad law of 1861 had been merely amendatory of the Act of 1853, preserving the sections with their numbers, there would have

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been some force in the position taken by the defendants. But when we come to examine the revised law of 1861, we find the sections entirely changed, and the subject matter of these three sections of the Act of 1853 is now found in Secs. 17, and 24 to 39 inclusive, in the Act of 1861. If the plaintiffs' proceeding is to be governed by Secs. 27-29 of the Act of 1861, they will be found entirely insufficient, without the use of other sections, to regulate the action of the officers having jurisdiction of the matter. We do not see how the Act of 1858 can be extended or construed to include these additional sections, or indeed be held to apply in any way to a law not then enacted. The Act of 1858 substantially incorporated these three sections of the Railroad Law of 1853 within its provisions, and the repealing clause of the Act of 1861 repealed the Act of 1853 so far as it applied to railroad companies, but substantially left these three sections in force, so far as they were made part of the law relating to water companies. We see no other mode of carrying out the evident intention of the Legislature. It would seem that if it had been their intention that water companies should be governed by the provisions of the new railroad law, they would have so expressed it, especially as at the same session they amended the section relating to this subject in the water companies' act. We hold, therefore, that the proceedings were properly conducted in accordance with the provisions of these three sections of the Act of 1853.

At the hearing before the County Judge of the application for the appointment of commissioners, the plaintiffs offered in evidence a certified copy of the certificate of incorporation, to which the defendants objected: 1st, that the certificate is not in accordance with the law of April 23d, 1858; 2d, that it varies from the complaint; and 3d, because the Act of April 23d, 1858, could not authorize them to incorporate themselves. The Act of April 23d, 1858, referred to (Stat. 1858, 254), authorizes George H. Ensign and his associates and their assigns, to lay down iron water pipes in the City of San Francisco, for the purpose of furnishing fresh water to the inhabitants, and provides that 3,000 feet be laid down within one year from its passage and water furnished therefrom, and that it should not take effect unless the parties named in Sec. 1

should within sixty days duly organize themselves in conformity with the laws regulating corporations. The articles of association of the corporation were filed June 19th, within the sixty days, signed by George H. Ensign, Henry Baker, and Edward Jones, and they refer to this Act of April 23d, 1858, and also to the Act of April 22d, 1858, authorizing the incorporation of water companies, as the laws under which they incorporate. In 1859 (Stat. 1859, 209) the Legislature passed an act amending Sec. 1 of the Act of April 23d, 1858, thereby extending the time two years for laying down the 3,000 feet of pipe.

It is insisted that the laying down of three thousand feet of pipe in one year was a condition, the non-performance of which forfeited the rights conferred by the act and vitiated the acts of incorporation, and that it was, therefore, necessary for the plaintiffs in this proceeding to prove a performance of that condition. The existence of a corporation formed under the general corporation laws of this State is proved by its articles of association or incorporation, executed and filed in accordance with the statute. A strict literal compliance with all the requirements of the statute is not essential, and the proceedings will not be held invalid for slight defects or omissions. Thus it has been held, that an omission of the names and number of the trustees who are to manage the concerns of the company the first year is not a fatal defect (*Mead v. Keeler*, 24 Barb., S. C., 20.) So of a failure to file a duplicate of the articles of association with the Secretary of State (*Cross v. Pinckneyville Man. Co.*, 17 Illinois, 54; *Mokelumne Hill M. Co. v. Woodbury*, 14 Cal. 427); or where, in the articles of association of a railroad company, the length of the line of the road was incorrectly stated (*Troy and Rutland Railroad Co. v. Kerr*, 17 Barb. S. C. 581); or a failure to pay the ten per cent. of the capital stock subscribed at the organization (*Eaton v. Aspinwall*, 10 N. Y. 119; *Abbott v. Aspinwall*, 26 Barb. S. C. 202); or a failure on the part of the commissioners appointed to receive subscriptions to the stock to follow the requirements of the law (*McFarland v. Triton Ins. Co.*, 4 Denio, 392; *Judah v. American L. S. Ins. Co.*, 4 Ind. 334); or stating the name of a city as "the place for business" instead of "the principal place of business," as required

by the law (17 Cal. 132). It is also held that a liberal construction is to be adopted with regard to the acts required to create a corporation, and every presumption is to be indulged in favor of its legal existence after it has gone into operation. (*Judah v. American L. S. Ins. Co.*, 4 Ind. 334; *Dunning v. New Albany and Salem R. R. Co.*, 2 Id. 437; 17 Ill. 54; Ang. & Ames on Corp. 573.) And when a corporation has gone into operation, acting under a charter granted upon a condition precedent, it will be presumed that the condition has been performed. (Ang. & Ames on Corp. 59.) It has also been held that the irregular or non-performance of acts relating to the organization of the corporation can only be investigated in a direct proceeding instituted by the State for that purpose, and not in a collateral action. (*McFarlan v. Triton Ins. Co.*, 4 Denio, 392; *Eaton v. Aspinwall*, 19 N. Y. 119; *Caryl v. McElrath*, 3 Sanford, S. C., 176.) So, too, of those acts which are not made prerequisites of the exercise of corporate powers, but which operate as a forfeiture of the corporate franchise. (*Mokelumne Hill Mining Co. v. Woodbury*, 14 Cal. 424; *People v. Manhattan Co.*, 9 Wend. 351.) This last case is directly in point upon the question raised by the defendants. The act incorporating the Manhattan Company required that they should within ten years from the passage of the act furnish a supply of pure, wholesome water sufficient for all the citizens of New York agreeing to take water upon the terms of the company, and this time was, by a subsequent act, extended ten years: held, that this was a *defeasance*, and not a *condition precedent*, to the exercise of corporate powers, and that, even after the time had expired, they were not bound to prove a performance of the condition to show a present right. The objection of the defendants that the plaintiffs did not prove a performance of this condition does not affect the rights of the plaintiffs in these proceedings.

As already stated, an act was passed in 1859 amending Sec. 1 of the Act of 1858, so as to extend the time for the performance of this condition, and it is objected that there was no proof that the plaintiffs ever *accepted* this amendatory act. Where a corporation is created by a special charter or act of incorporation it has been held that in order to complete the creation the charter must be

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accepted by the persons incorporated. (Ang. & Ames on Corp. Secs. 81, 82.) But this rule of law has no application whatever to corporations formed under general laws like those of this State, where the corporators are the acting party in creating the corporation. In the present case a law is passed for the special benefit of the plaintiffs, and in such case the presumption is that they ask for its passage, or that they have accepted it, and no express acceptance is required to be shown. (Ang. & Ames on Corp. Sec. 83.)

It is also objected, that there is no proof of any assignment from Ensign and his associates to the plaintiffs of the franchise or privileges granted by the Act of 1858 and the amendatory Act of 1859 to the former. No such assignment is necessary. The grant was to Ensign and his associates, and one of its express conditions was that they were to incorporate themselves, and when they did so the franchise immediately vested, by operation of law, in the corporation. The extension of time granted by the Act of 1859 was for the benefit of the corporation, and no assignment under it was necessary. The Act of 1859 in no sense affected the organization of the corporation.

It is also urged that the commissioners erred in not allowing the parties to prove the respective claims set up by them to the land. Sec. 28 of the Railroad Law of 1853 provides, that companies desiring to procure any lands shall file a petition praying the appointment of commissioners to "ascertain the compensation to be made to the owners and persons interested." "The commissioners having heard the proofs and allegations of the parties, three or more of said commissioners shall, after viewing the premises, without fear, favor, or partiality, ascertain and certify the compensation proper to be made to the said owners and parties interested for the land, real estate, and property so to be taken or injuriously affected." In proceedings of this character, to condemn land for railroad purposes, it is usual to include in one petition several tracts on the line of the road, each tract having its owner or owners, and often there are several adverse and conflicting claimants of the same tract. The duties of the commissioners are plain and simple. They are merely to ascertain and report the compensation to which

the owners of each particular tract of land are entitled; and for the purpose of ascertaining the amount of such compensation, they are required to hear the proofs and allegations of the parties, and to personally view the premises. The market value of the land taken is the main ingredient of this estimate, though now, by the Act of 1861, they are required to make allowance for any benefit or advantage that in their opinion will accrue to the owners by reason of the construction of the railroad; but that is not an element of the estimate in this case. The commissioners are selected, not for their supposed judicial abilities, but for their good judgment in estimating the value of property, and their disinterestedness. It is no part of their duties to hear evidence and determine the right, title, and interest of each claimant of the several tracts of land, whether such claims are conflicting or not. The Court or Judge before whom the proceedings are conducted, and not the commissioners, is the proper tribunal to determine such questions. After the report of the commissioners is made and filed, and the money paid into the hands of the County Clerk, the Court or Judge can, on motion, distribute the same among the several owners and claimants, according to the extent of their several interests; and, if there are adverse or conflicting claims, can determine them, and award the compensation to the person really entitled. When there are no questions as to who are the real owners of the tract, and there are several persons having divided or undivided interests therein, it is proper for them to set forth such interests in their answer to the petition, and ask that the same may be separately estimated, and there would be no impropriety in the Court or Judge directing the commissioners to make such separate estimate and their reporting accordingly. This is a matter depending, however, upon the sound discretion of the Court or Judge. There is nothing in the statute which requires the commissioners to determine these questions of title, or which requires them to report the amount of compensation each of the claimants of the same tract is entitled to. In this case the commissioners refused to hear evidence upon questions of title and ownership, and reported a gross sum as the proper compensation for the tract, and in this there was no error. The County Judge is competent to distribute this sum among the several owners

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according to the extent of their interests, and can, if necessary, hear evidence upon those questions.

The commissioners viewed the premises *before* hearing the evidence and declined to view them *after* the testimony was closed, and this refusal is also alleged as error. The statute requires that they shall, after viewing the premises, ascertain and certify the compensation proper to be made. Under the statute they can make this view at any time before making their estimate and report. Whether this is done before or after hearing the evidence, depends upon their own discretion. There is a manifest propriety in making this inspection before hearing the evidence, as thereby they will be the better able to understand and apply the testimony.

Judgment affirmed.

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THE right to the use of growing wood and timber upon the public mineral lands, as between the claims of miners on the one hand and agriculturists on the other, is governed by the rule of priority of appropriation.

The possession of public land in the mineral districts of this State, acquired and held in accordance with the possessory act for agricultural purposes, carries with it the right to the wood and timber growing thereon, and this right is superior to that of subsequent locators of mining claims who need, and seek to use, the wood and timber for carrying on their mining operations.

In an action between occupants of the public lands neither party can claim a right to the growing timber thereon under the laws of the United States. The cutting or destruction of the timber by any occupant is expressly prohibited by Act of Congress of March 2d, 1831. ●

APPEAL from the Fourteenth Judicial District.

The Court below, to whom the case was submitted without a jury, found the facts as follows: "At the commencement of this action and for several years prior thereto, plaintiff was in possession of a tract of land or ranch on the public domain in Nevada County, containing about one hundred acres, which he used for agricultural purposes and held under the possessory act of this State, having all the titles thereto that can be acquired by virtue of a compliance with the provisions of said act. He resided on the

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land with his family, and had erected thereon valuable improvements, consisting of buildings, orchards, vineyards, ornamental trees, etc., at an expense of about \$8,000. Nearly one-fourth of the tract was under cultivation, the balance is in a wild state, and a portion is covered with oak and pine trees, enough in all, probably, to make five or six hundred cords of wood. The tract lies on the side of the hill which forms the north bank of Deer Creek—the creek being the southerly line—and a portion of the ground is very steep and rugged. Upon the lands immediately surrounding this tract the timber has nearly all been destroyed. On several parts of the ranch gold has been found and mining has been carried on, but in the particular portions on which the trees were cut by defendants it is not shown that there is or was any minerals. At or near the westerly boundary of this tract the defendants, who are miners, have a set of quartz claims and a quartz mill, used in extracting the gold from the rock taken from said claims. The ledge upon which the claims are situated runs in the same general direction with the said westerly line of plaintiff's ranch. For the distance of two hundred feet, or thereabouts, from the creek, the surface or 'croppings' of the ledge is in whole or in part within plaintiff's land—from thence it is without said line; but the ledge dips or inclines towards and under plaintiff's land, at an angle of about forty-five degrees, and the point at which defendants are at work underground, by means of tunnels, is beneath a portion of the ranch. The mill of defendants stands very near the westerly line of the ranch, but entirely outside of it. In order to extract the gold from the quartz in a practicable and advantageous manner, it is necessary for defendants to have wood for the purpose of heating water to be used in the amalgamatory process, and for this purpose they cut the trees complained of. They were cut at a point on plaintiff's ranch about twelve hundred feet from the nearest point of the surface of defendants' claims. The trees cut were native forest trees, and were taken from that portion of the ranch which had never been in any manner cultivated or improved. Owing to the scarcity of timber in the vicinity, and the steepness and ruggedness of the ground which renders the mill difficult of access, defendants cannot obtain wood from any source in the imme-

diate neighborhood other than the land of plaintiff. But defendants *could* obtain wood by purchasing it from parties at some distance—of course at a greater cost. It is necessary for defendants to use about fifty cords of wood per year. I find that defendants cut on plaintiff's land as aforesaid twenty-eight trees, worth in the aggregate fifty dollars. In the mining district where these claims are, it is the custom with miners to locate quartz claims one hundred feet wide on the surface—fifty feet each way from the center of the ledge—but running with its dips and inclinations. Plaintiff claims that all the wood now on his ranch is not more than sufficient for his fire-wood and domestic purposes, and also that he had recently sold some wood to persons living in the neighborhood."

Judgment was rendered for defendants, and plaintiff appeals.

John Garber, for Appellant.

I. To justify an entry on lands held for agricultural and grazing purposes, the miner must show affirmatively that the *locus in quo*, the very ground entered upon, is mineral land. The ranchman who either incloses or complies with the possessory act has a good and indefeasible right and title, as of fee, against all the world, except where the land is mineral land, etc., then if none of plaintiff's tract contained mineral, the miners could enter on no part of it. If of his one hundred acres fifty only contain minerals, on that fifty alone can the miner enter. This seems clear, because the statute and the law give the miner this right of entry only when and because it contains gold. If the land, or any part of it, contain no gold, there is no necessity or pretext for the entry.

The mere position of the lines of the plaintiff's survey can neither give or take away this right of entry, for there is no connection between the lines and the right of the miner. If he have the right, it is on other grounds and for other and more substantial reasons, for the purpose of extracting the mineral it contains, to prevent monopoly, etc. If I take up mineral land, I take it subject to this right of entry; if I take up non-mineral land, I take it absolutely; if I take up land partly mineral and partly not, I take it partly subject.

II. Defendants must be at least confined to the boundaries of

their claim. The law never contemplated that the miner who had located a small claim on one corner of a ranch could trespass over the whole ranch *ad libitum*, even if it all contained minerals. Such a privilege cannot be said to be in any sense necessary, nor its exercise *bona fide*.

In *Burdge v. Underwood* (6 Cal. 45) a case very like this was presented, the case of a miner attempting to dig a ditch through a ranch to his claims, outside the limits of the ranch. The ditch there was conceded to be necessary to the working of the claims; true, it could have been dug elsewhere at a greatly increased cost. Here the wood could be purchased at a slightly increased cost, viz.: seventy-five dollars per annum. It was held a trespass. If that case was decided upon the ground that the claims were not on the ranch, it is authority for us; because here the mill was also outside our lines, and because, as we have endeavored to show, if the miner can go outside of his claim the limits of the ranch will not stop his encroachment.

III. The evils to be prevented by the policy of the law giving the right of entry to miners, will none of them be entailed by the decision we ask in this case. From such a ruling no monopoly can arise. The full, free, and beneficial working of the mines will still be easy and practicable. On the other hand, to sustain defendants' pretensions would lead to consequences the most ruinous and absurd.

This Court has settled that the farmer will be protected in all cases, except where an invasion of his rights is necessary and indispensable. What is the meaning of these terms in this connection? We can see plainly that in *Clark v. Duval* the building of the reservoir and the use of the water were necessary and indispensable; that without them the right to mine or enter would be a barren right. But is this so as to timber in any case? Would defendants' right to their ledge be worthless without the right to this timber? In *Smith v. Doe* the Court say, the use must be reasonable, and with just respect to the farmer's rights. What does this limitation signify? Simply that those privileges, and those only, must be allowed to the miner, without which he could not mine beneficially and to advantage—those which are necessary and indispensable. The same rule which has always been applied

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in cases of a license or reservation. (Collier on Mines, 58 *et seq.*; *Darcy v. Arkwith*, Hobert, 284; *Cardigan v. Armitage*, 2 B. & Cress. 197; *Broadbeat v. Wilkes*, Willis, 85.)

Searls and *Niles*, for Respondents, referred to the opinion of the District Judge filed in the Court below, as showing sufficient reasons for sustaining his judgment. The following is a copy of that opinion :

“ The question of law to be decided is, had defendants, by virtue of their ownership of their mining claims and as incident thereto, the right to cut wood on plaintiff’s ranch, outside of the surface limits of their claim, sufficient to carry on and complete their mining process? The question is an important one ; for although each case of this nature must be determined, in a great measure, upon its own particular facts, still the decision of this cause must involve principles applicable to a large class of mining cases yet to be determined. Plaintiff contends that although the miner may enter upon mineral land held for agricultural purposes, he can only use that portion of it which actually contains mineral. This position is, I think, incorrect. Whatever rights a miner has in the land adjoining his claim does not depend upon the composition of the soil in such land. If, for instance, in order to work his claim, it be necessary to build a reservoir at some distance from his lines, he has the undoubted right so to do, whether the ground selected for his reservoir contain gold or not. This was expressly decided in *Clark v. Duval* (15 Cal.) and in *Burdge v. Underwood* (6 Id.) where miners dug a ditch through a ranch a mile distant from their claims—and where but a small portion of the ranch was shown to contain gold—the decision would evidently have been for the miners had not the ditch interfered with land held for other than agricultural purposes. The miner, therefore, undoubtedly has *some* rights on the public land adjoining his claim whether such land contains gold or not ; and the question is, has he the right to take wood from such land sufficient to carry on his mining operations? The Supreme Court of this State has not decided this exact question, but I think it has established the principle upon which it should be determined. An examination of all the cases, from *Hicks v. Bell*

down, shows that in every instance where the rights of the miner have come into conflict with those of the agriculturist, holding simply as such and not by virtue of valuable improvements, the latter have been held almost entirely subordinate to the former. The theory of all the cases is, that the mineral region of California has, by both the General and State Governments, been exempted from location for agricultural purposes, *as against miners*. In *McClintock v. Bryden* the Court says, that the General Government reserves the mines from the operation of preëmption laws and refuses to grant patents therefor; that the plaintiff in that case had acquired no right from the General Government, and that the State Government in declaring what lands may be possessed for agricultural and grazing purposes expressly excepts lands containing precious metals. The possessory act of this State provides that miners may work mining land located for agricultural purposes 'as freely and unreservedly' as if no such location had been made. All *other* occupants of the public mineral land stand upon equal footing and the first appropriation takes; but this rule does not obtain with respect to the agriculturist—he takes in subordination to the miner. He cannot prevent the miner from working 'freely and unreservedly,' except that the latter cannot destroy valuable and permanent improvements. In *Fitzgerald v. Urton* (5 Cal.) the Court uses this language: 'The occupant may rely upon his possession as against a mere trespasser, and the fact that the land is upon the public domain or contains precious metals, will afford no authority to third persons entering upon his possessions, except in the cases allowed by the statute. These cases are: 1st, when the land is used for grazing; 2d, for agricultural purposes.' These and numerous other cases establish the absolute and unconditional right of a citizen to mine on any portion of the public mineral region, whether located for agricultural purposes or not. And it must be remembered that plaintiff claims entirely under his *location* for agricultural purposes—not by virtue of permanent improvements or upon the ground that he occupies the premises for any other purposes than those mentioned in the statute under which he holds. What then does the 'right to mine' include? Certainly not the mere privilege of digging within the narrow boundaries prescribed

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by local custom as the limits of mining claims. These local customs designating the size of claims are intended simply to limit miners *as against other miners*, not as against the agriculturist. And the right is not simply to dig, but to *mine*, and to use all the elements or products of the land necessary to conduct and complete the mining process. In the case of *Tartar v. The Spring Creek Co.* (5 Cal.) a company of miners sought to take water away from the owners of a saw mill who were the prior appropriators. The Court decided that this could not be done—the owners of the saw mill occupying an entirely different position from that of an agriculturist—but uses this language: ‘The appellants insist that as the State has granted the franchise of digging gold, all of the incidents necessary to that purpose—wood, water, etc.—must follow. This is certainly the doctrine of the Common Law, and would be held decisive of this case in the absence of any other right to contradict it. But in previous decisions we have shown that there is nothing sufficiently expressive in the character of that legislation to warrant an interference with the already acquired rights of individuals, *except in the single case of agricultural lands.*’ In *Clark v. Duval* (15 Cal.) plaintiff held land for agricultural purposes, both under the possessory act and by actual inclosure. Defendants entered upon the land to mine; located claims on one part of it, and constructed reservoirs, ditches, and flumes on other portions of it. In delivering its opinion the Court says: ‘In giving effect to the policy of the Legislature we must hold, that the miner is not confined to a mere right of entry and egress, and a right to dig the soil for gold. Whatever is indispensable to the exercise of the privilege must be allowed him, else it would be a barren right subserving no end. But the substantial thing is a right to use the land upon which he goes, not merely to dig but to mine—and so to use the land and such elements of the freehold or inheritance, of which water is one, as to secure the benefits which were designed.’ It will be noticed that in these cases the miners used land outside of the limits of their mining claims, and that all the land so used was not shown to be actually gold-bearing soil. In fact, without deciding that all the land in a gold-bearing district must be considered mineral land, it is not going too far, I think, to say that all of

a small tract of an hundred acres *should* be classed as mineral land within the meaning of the decisions when, as in the case at bar, gold has been discovered and mining carried on upon several different parts of the tract. It appears, also, from these decisions, that wood is one of the elements of the land that may be used by the miner. It is contended, however, that under the rule in *Clark v. Duval*, only those elements of the soil which are absolutely necessary to the process of mining can be taken by the miner; that in the case at bar the wood on plaintiff's land was not necessary because defendants *might* have obtained wood, by purchase, from other sources; and that in as large a business as that of defendants—in which they have from \$100,000 to \$200,000 employed—the difference of cost between fifty cords of wood cut on plaintiff's land and the same amount purchased from third parties, is too trivial a matter to be called a necessity. But this is too narrow a view of the necessity contemplated in that decision. The necessity is, not that *the wood* growing on plaintiff's ranch is indispensable to the working of defendants' claims, but that wood from some source is necessary; and wood being necessary defendants may take it from plaintiff's land. It must be remembered that the right of the miner is not a mere special privilege or easement, in the land of another, circumscribed and overshadowed by the superior title of the agriculturist; it is an original, independent, and superior right, paramount to that of the agriculturist, and subject to which the latter locates. In determining, therefore, what incidents follow this right, we must give to the language of the Courts used in reference to the subject, not a strict but a liberal construction. I think that in the case at bar, the right to take wood, as exercised by defendants, belonged to them by virtue of their ownership of their said mining claims and as incident thereto. From the foregoing views it follows, as a final conclusion of law, that defendants had the right to do the things complained of in the complaint, and that they have the right to cut and take away from the said land of plaintiff sufficient of the native forest trees growing thereon to carry on their said mining process as aforesaid, provided that in so doing they may not injure, destroy, or interfere with any of the valuable and permanent improvements of plaintiff."

CROCKER, J. delivered the opinion of the Court—CORE, C. J. concurring.

This is an action to recover damages for cutting timber on plaintiff's land, and for an injunction against any future acts of the same kind. It appears that for several years prior and up to the commencement of this action, the plaintiff was in the possession of a tract of about one hundred acres of public land in one of the mineral districts, which he held under the possessory act of this State, the provisions of which he had fully complied with. He resided on the land with his family, and had put thereon valuable improvements, consisting of buildings, orchards, vineyards, ornamental trees, etc., at an expense of about \$8,000. A portion of the tract was under cultivation, and the remainder in its wild state, a portion of the latter being covered with oak and pine trees. At several places on the ranch gold had been found and mining carried on, but not on those portions where the timber in controversy was cut. The defendants are miners, owning and working quartz claims. About two hundred feet of their quartz ledge is on plaintiff's land, near the boundary line, and the ledge dips under plaintiff's land at an angle of about forty-five degrees. The defendants also own and work a quartz mill, for the crushing of the rock from their claims, which is located near plaintiff's land. The defendants are compelled to use wood to heat the water used in the amalgamatory process, in their mill, and they cut wood upon the plaintiff's land, about twelve hundred feet from the claims, for this purpose, which constitutes the trespass complained of. Upon this state of facts the Court below rendered judgment for the defendants, from which the plaintiff appeals.

Under the laws of this State, any citizen of the United States may enter upon and hold an amount of the public domain, whether within the mineral districts or not, or whether containing mines or not, not exceeding one hundred and sixty acres. He has the right to occupy and improve it, cultivate the soil, plant orchards and vineyards, and apply it to such uses as he may deem most advantageous to himself. But his possession of the land for the common usual purposes of grazing and agriculture, is subordinate to the right of the miner, who, when acting in good faith, has the right to

enter upon any tract of land held by another merely for agricultural or grazing purposes, and to mine the same, doing no more injury to the premises than may be necessary to enable him to work the mine in the most practicable manner.

The policy of this State is "to permit settlers in all capacities to occupy the public lands, and by such occupation to acquire the right of undisturbed enjoyment against all the world but the true owner." (*Tartar v. The Spring Creek Water and Mining Co.*, 5 Cal. 395.) This right of possession is exclusive of all others, except the miner, who has the right to enter upon any tract of mineral land which may be occupied by another merely for agricultural or grazing purposes, and to locate his mining claim thereon, according to the usage and custom of miners—to pass and repass over the land in going to and from his claim; to dig up the soil, sink shafts, run tunnels, and do all other acts necessary and proper to enable him to work his claim efficiently, being careful to do no unnecessary injury to the land.

Such, in general terms, are the rights of the miner; but these rights are subject to limitations and restrictions, necessary to prevent an interference with rights of property vested in others, and which are entitled to equal protection with his own. Thus he has no right to use water to work his mine which has been appropriated to other legitimate purposes. (*Irwin v. Phillips*, 5 Cal. 140; *Tartar v. The Spring Creek Water and Mining Company*, Id. 395.) Nor has he a right to dig a ditch to convey water to his mine over land in the possession of another. (*Burdge v. Underwood*, 6 Cal. 45; *Weimer v. Lowry*, 11 Id. 104.) Nor can he mine land used for a residence and for purposes connected therewith. (*Fitzgerald v. Urton*, 5 Id. 308.) Or land used for houses, orchards, vineyards, gardens, and the like. (*Smith v. Doe*, 15 Id. 101; *Gillan v. Hutchinson*, 16 Id. 153.)

In *Smith v. Doe* (15 Cal. 101) the Court say: "It must not be understood, however, that within the limits of the mines all possessory rights and all rights of property, not founded upon a valid legal title, are held at the mercy and discretion of the miner. Upon this subject it is impossible to lay down any general rule, but every case must be determined upon its own particular facts. Valuable

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and permanent improvements, such as houses, orchards, vineyards, etc., should undoubtedly be protected; as also growing crops of every description, for these are as useful and necessary as the gold produced by the working of the mines. Improvements of this character, and such products of the soil as are the fruits of toil and labor, must be regarded as private property, and upon every principle of legal justice are entitled to the protection of the Courts."

As was said in the case of *Tartar v. The Spring Creek Water and Mining Company*, "the legislation and decisions have been uniform in awarding the right of peaceable enjoyment to the first occupant, either of the land or of anything incident to the land." In that case, as also the case of *Clark v. Duval* (15 Cal. 85), the Court recognize the common law principle that the grant of the right to mine carried with it all the incidents necessary to that purpose; that this included the use of the land and such elements of the freehold and inheritance, as wood, water, and the like, as were necessary for mining purposes. But in the former case the Court expressly says that "there is nothing sufficiently expressive in the legislation of the State which warrants an interference with the already acquired rights of individuals, except in the single case of agricultural lands. So in *Stokes v. Barrett* (5 Cal. 36) the Court say, that "to authorize an invasion of private property, in order to enjoy a public franchise, would require more specific legislation than any yet resorted to." And in *Gillan v. Hutchinson* (16 Id. 153) it was held that the Legislature had no power to take the property of one person and give it to another, and therefore the Act of 1855, giving the miner the right to dig up an orchard, vineyard, garden, and crop of growing grain by tendering the owner a bond for the payment of all damages, was held invalid.

Such are some of the principles which this Court has laid down in determining the numerous questions which have arisen between the occupant of the public lands and the miner. While the rights of the latter have been sedulously guarded, the Court have been equally careful to protect the rights of the former from invasion. The question now before us has never yet been determined by this Court, but it is to be adjudicated in accordance with those fundamental principles regulating the rights of property, by which one

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person is not permitted to take and hold that which belongs to another. The rule that priority of appropriation gives priority of right, must determine this as it has numerous other cases of the same class. The plaintiff in this case, by his prior occupation, acquired the right to the peaceable enjoyment of the land, which includes the trees growing thereon. The defendants, in locating their mining claims, took it subject to the prior vested rights of the plaintiff. They took them subject to the rule of property laid down in *Irwin v. Phillips* (5 Cal. 140): "The miner who selects a piece of ground to work must take it as he finds it, subject to prior rights, which have an equal equity on account of an equal recognition from the sovereign power. If it is upon a stream, the waters of which have not been taken from their bed, they cannot be taken to his prejudice; but if they have already been diverted, and for as high and legitimate a purpose as the one he seeks to accomplish, he has no right to complain—no right to interfere with the prior occupation of his neighbor, and must abide the disadvantages of his own selection." The right of the plaintiff to cut and use the timber growing on the land for his own domestic purposes, is as high, if not higher, than that of the defendants to use it for mining purposes. If the defendants have located in a place where wood is difficult to procure, or where wood lands are held and occupied by others, that is one of the disadvantages of their selection from which the Courts cannot relieve them.

The defendants can claim no right to the timber under the laws of the United States. The Act of Congress of March 2d, 1831, prohibits all persons from cutting, destroying, or removing timber on any of the lands of the United States, except for the use of the navy, and prescribes a fine of not less than triple the value of the trees or timber so cut, destroyed, or removed, and imprisonment not exceeding twelve months, as a punishment for those who violate the provisions of the law. And, in the case of *Cotton v. The United States* (11 How. U. S. 229), it was held, that the United States have the right to bring an action of trespass against a person for cutting and carrying away trees from the public lands. The public mineral lands of this State belong to the National Government, which has the full power of disposing of the land and the timber

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growing thereon in such manner as it may deem proper. Congress, in the exercise of this power, has authorized the settlement and occupation of the public lands, but has expressly prohibited the cutting or destruction of the timber growing thereon. The defendants cannot, therefore, claim that the laws of the United States protect them in their acts. They were, in our judgment, trespassers in cutting and carrying away the trees growing on the land.

The judgment is reversed, and the Court below is directed to enter a judgment in accordance with this opinion.

SLEEPER v. KELLY *et al.*

A PLAINTIFF cannot appeal from a judgment of nonsuit rendered on his own motion.

APPEAL from the Fourth Judicial District.

This was an action of ejectment and tried by a jury. Plaintiff, to show his title, offered in evidence a certain deed, which, on objection of defendant, was excluded and plaintiff excepted. Plaintiff then rested and moved the Court to allow a judgment of nonsuit to be entered, which was accordingly done. Afterwards plaintiff moved to set aside the judgment and for a new trial on the ground that the Court had erred in excluding his evidence. This motion was denied, and the plaintiff appeals from the judgment and the order refusing to set it aside.

Wilson & Letcher, for Appellant.

O. C. Pratt, for Respondents, cited *Imley v. Beard* (6 Cal. 666).

CROCKER, J. delivered the opinion of the Court—COPE, C. J. and NORTON, J. concurring.

This is an appeal from a judgment of nonsuit. The record shows that the nonsuit was granted on the motion of the plaintiff, and an appeal by him does not lie in such cases. (*Imley v. Beard*, 6 Cal. 666.)

The judgment is therefore affirmed.

Keller v. Hicks.

KELLER v. HICKS *et al.*

A COUNT in a complaint in the old form of assumpsit for money had and received, in which the promise is laid of a day more than two years prior to the commencement of the action, is demurrable on the ground that it shows the demand to be barred by the Statute of Limitations.

The assignor of a county warrant, who transfers the same by indorsement, is not liable to the assignee as an indorser of negotiable paper, nor as an assignor of an instrument in writing promising to pay money, or acknowledging money to be due, under the statute relating to bonds and due bills.

Dana v. San Francisco (19 Cal. 486) affirmed on this point.

The husband of a married woman is properly joined with her as a party defendant in an action upon a partnership obligation contracted by the wife and third persons as partners previous to the marriage and while she was a *femme sole*.

A complaint which contains a count setting forth the facts attending the purchase of a county warrant by plaintiff, and charging that defendants are liable upon an implied contract to repay the purchase money, and a second count charging defendants as indorsers of negotiable paper, and a third count in the usual form for money had and received, is not demurrable on the ground of a misjoinder of causes of action.

A county warrant drawn by the Auditor, directing the Treasurer to pay to H. & Co. nine hundred and sixty-five dollars for services as county printer, was for a valuable consideration indorsed by H. & Co. to F. and by F. transferred to plaintiff for nine hundred and sixty-five dollars paid by the latter. The warrant was in fact illegal and valueless, and payment being for this reason refused by the Treasurer plaintiff instituted the present action against H. & Co. and F. to recover back the amount paid by him, setting up in the complaint the foregoing facts, and that defendants, at the time of their transfers, represented that the warrant was valid and would be paid on presentation: *held*, on demurrer, that the complaint stated a cause of action, and that on the facts alleged plaintiff was entitled to recover from defendants the money which he had paid for the warrant.

APPEAL from the Tenth Judicial District.

The facts are stated in the opinion.

C. E. DeLong, for Appellant.

I. The husband of Mrs. Carr was properly joined with her as a party defendant. Sec. 7 of the Practice Act provides that "when a married woman is a party her husband shall be joined with her, except when the action concerns her separate property, or when the action is between herself and her husband," neither of which exceptions exist here.

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II. No improper joinder of action is apparent from the complaint. Sec. 64 of the Practice Act provides that "the plaintiff may unite several causes of action in the same complaint when they all arise out of contracts express or implied," etc. It is well settled that an action for money had and received may be maintained by the payee of a promissory note against the maker and likewise against an indorser. (*Eagle Bank v. Smith*, 5 Conn. 74, 75; *Jones and wife v. Steamship Cortes*, 17 Cal. 487.)

III. No ambiguity, uncertainty, or unintelligibility is apparent upon the face of the complaint. Objections to a complaint, when they arise from mere matters of form, are not the subject of demurrer. (*Otero v. Ballard*, 3 Cal. 188; *Rollins v. Forbes*, 10 Id. 29.) A complaint which demands more relief than can be awarded is not demurrable. (*Moses v. Walker*, 2 Hill, 536.)

IV. The plaintiff's entire cause of action pleaded is founded upon the county warrants—instruments in writing. These warrants were purchased by plaintiff in January, 1859, and this action was instituted in November, 1862, within four years. The Limitation Act provides that within three years an action may be brought for relief upon the ground of fraud, the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud. The complaint sets up fraud in the sale and assignment to plaintiff of void warrants and illegal claims against Yuba County. It is averred that we did not discover the fraud until a few months prior to the time this action was commenced. "When a complaint does not directly show *prima facie* a case for the operation of the statute, a demurrer cannot be sustained upon this ground." (*Barringer v. Warden*, 12 Cal. 311; *Sublette v. Tierney*, 9 Id. 423; *Conger v. Weaver*, 10 Id. 233.) "The bar of the statute must clearly appear upon the face of the complaint." (*Ord v. De la Guerra*, 18 Cal. 67.)

V. "A demurrer to the whole declaration when some of the counts are good should be overruled." (*Whiting v. Heslep*, 4 Cal. 347; *Weaver v. Conger*, 10 Id. 233; *Martin v. Matheson*, 8 Abbott's Pr. 3; *Newbury v. Garland*, 31 Barb. 121.) Our statute relative to bonds, due bills, etc., makes county warrants negotiable and places them upon the same grounds, and makes them

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subject to the same rules as ordinary bills of exchange. (Wood's Digest, 75, Secs. 1-4.) The draft of a city upon its Treasurer, payable to L. or order, is a negotiable bill of exchange. (*Kelly v. The Mayor of Brooklyn*, 4 Hill, 263.) The seller of a public security takes upon himself the risk of its being genuine, and if it prove otherwise he is responsible, especially if he affirmed it to be good. (*Turner v. Tuttle*, 1 Root, 350.)

The indorsement of a note non-negotiable is equivalent to the making of a new note. It is a direct and positive undertaking on the part of the indorser to pay the note to the indorsee, and not a conditional one to pay it if the maker does not upon demand and notice. The indorser in such case stands in the relation of a principal and not a surety to his indorsee, and has no right to insist upon a previous demand and notice. (*Chitty on Bills*, 142; 4 Mass. 258; 8 Wend. 403; 15 Id. 19; 10 Barb. 402. See also Story on P. Notes, Sec. 118; *Warkle v. Hatfield*, 2 Johns. 453; 5 Conn. 71.)

One who transfers a negotiable note by mere delivery, without indorsing it, warrants its genuineness. (*Williams v. Mathews*, 3 Conn. 252; *Turner v. Tuttle*, 1 Root, 350—above cited.) These warrants having been sold to plaintiff by Felton as genuine warrants of value, and not being such, he is clearly liable to plaintiff in an action for money had and received for the money paid to him for them.

F. D. Hatch, for Respondents Hicks & Co.

I. The first two counts show no cause of action against the defendants, or any of them. The county warrants sued upon are treated as bills of exchange, and the defendants are sought to be held simply as indorsers. This Court has held that county warrants are not bills of exchange, or negotiable instruments, and that the holder of such warrants cannot maintain an action upon them treating them as such. (*Dana v. San Francisco*, 19 Cal. 486.) Nor can the appellant bring the case within the statutes relating to bonds, due bills, etc. (Wood's Digest, 75.) County warrants are not bonds, due bills, or "other instruments of writing," whereby any "person," or "body politic or corporate," promises or agrees

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to pay any sum or sums of money, or articles of personal property, or any sum of money in personal property. To come within the statute the instrument must be such an instrument as evidences of itself an indebtedness. (See cases above cited.)

II. The third count is a simple count for money had and received. It is complete in itself, and for the purposes of the demurrer must be treated as such. Dating from the twelfth of January, 1858, the time of the alleged promise to pay, and more than five years have elapsed. Dating from the twelfth of January, 1859, the time of the alleged indebtedness, and more than four years have elapsed. The right of action for money had and received is barred in two years. (Wood's Digest, 47, Art. 17.)

Demurrer is the proper pleading when it appears upon the face of the complaint, or upon the face of the count, that the right of action is barred by the Statute of Limitations. (*Sublette v. Tierney*, 9 Cal. 425; *Barringer v. Warden*, 12 Id. 314.)

C. E. Filkins, for Respondent Felton.

CROCKER, J. delivered the opinion of the Court—COPE, C. J. and NORTON, J. concurring.

This is an action to recover the amount of certain county warrants or orders drawn by the County Auditor upon the County Treasurer of Yuba County in favor of W. F. Hicks & Co. The complaint avers that the defendants, Hicks, Magruder, Addington, and Mrs. Laird (now Mrs. Carr), were partners, under the name of W. F. Hicks & Co., and as such printed the delinquent tax list of Yuba County for the year 1858; that two warrants, or orders, were issued to them therefor, the following being a copy of one of them:

“MARYSVILLE, December 24th, 1858.

“Warrant No. 712.—To the Treasurer of Yuba County: Pay to W. F. Hicks & Co., or order, the sum of nine hundred and sixty-five dollars for services as County Printer.

“Yuba County Treasury Warrant for \$965.

“W. H. WICKERSHAM, County Auditor.”

That January 2d, 1859, Hicks & Co., for a good and valuable con-

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sideration paid them by the defendant Felton, indorsed and delivered the warrants to him; that Felton, on the twelfth day of January, 1859, sold and delivered the warrants to the plaintiff for the sum of nine hundred and sixty-five dollars, paid him by one Smith, out of plaintiff's money; that the warrants were not paid, and he commenced an action against the County Treasurer to compel their payment, and upon appeal to this Court it was decided that the warrants were illegally drawn and therefore void (*Keller v. Hyde*, 20 Cal. 593), and that judgment was accordingly rendered against him on the first day of September, 1862, which was the first knowledge he had of the facts on which the invalidity of the warrants was founded, and of the fraud perpetrated upon him; that the defendants represented to him that they were just and valid claims against the county, upon which representation he purchased the warrants and paid Felton the sum of nine hundred and sixty-five dollars; that he has demanded payment of the defendants which they have refused. Then follows a count in which the warrants are counted on similar to promissory notes or bills of exchange under the old forms, followed by a count in assumpsit for nine hundred and sixty-five dollars, for money had and received, the promise in which is laid as of January 12th, 1858.

To this complaint Felton filed his separate demurrer, and the other defendants a joint demurrer, upon the following grounds: 1st, misjoinder of defendants; 2d, that several causes of action were improperly united; 3d, that it is ambiguous and uncertain; 4th, that the cause of action in the last count is barred by the Statute of Limitations; 5th, that the complaint does not state facts sufficient to constitute a cause of action. The Court sustained the demurrer, and allowed the plaintiff ten days time in which to amend his complaint. Failing to amend within the time, a final judgment was rendered for the defendants, from which he appeals.

The demurrer of Felton sets forth that the two last counts were barred by the Statute of Limitations, while that of the other defendants applied that ground only to the last count. Each count is to be deemed as a separate and independent cause of action, and the demand set forth in the last count is clearly barred by the Statute of Limitations, whether the date of the liability is January 12th,

1858, or January 12th, 1859. It is upon a liability not founded upon an instrument of writing, for no writing is referred to in that cause of action or count, and the two years' limitation therefore applies to it; and as this action was not commenced until November 3d, 1862, it was not within the time limited by the statute.

As to the second count, in which the warrants are treated as written obligations to pay money, on which the defendants are liable as indorsers, it is clear that it sets up no cause of action, as was substantially held by this Court in *Dana v. San Francisco* (19 Cal. 486). The demurrer was, therefore, properly sustained as to the second and third causes of action. This leaves only the first cause of action to be examined.

The complaint alleges that Mrs. Carr, the wife of the defendant Wm. Carr, was, prior to her marriage to Carr, a *femme sole*, and as such, under the name of Mrs. Laird, was a member of the partnership firm of Hicks & Co. The defendants insist there was a misjoinder of parties in making her husband defendant with herself and the other parties. We think this objection is not well taken. She still remained liable to be sued for the debts of the firm of which she was a member, and after her marriage it was necessary to make her husband a defendant with her in all actions of that kind. All the several causes of action set forth in the complaint, arising as they do out of contracts, were properly united in one action under Sec. 64 of the Practice Act. Nor is there any ambiguity or uncertainty in the complaint. The only ground of demurrer to the first cause of action to be examined is, therefore, whether it states facts sufficient to constitute a cause of action.

Hicks & Co. were indorsers upon the warrants, and the plaintiff claims that they are liable to him as indorsers of negotiable paper; and if not in that way, then as assignors under the statute relating to bonds, due bills, etc. (Wood's Dig. 75.) In *Dana v. San Francisco* it was held that such warrants were not intended as evidence of a debt, but merely as the means prescribed by law for drawing money from the county treasury, and that an indorsement of such paper did not transfer the legal title like an indorsement under the law merchant. It is clear, therefore, that the defendants are not liable as indorsers of negotiable paper. Nor are those war-

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rants instruments in writing, promising or agreeing to pay a sum of money, or acknowledging a sum of money to be due, within the statute relating to bonds and due bills. Of course, they cannot be held liable as assignors under that statute. It is not averred that Felton indorsed the warrants, so that neither of these grounds of liability apply to him.

If, however, it is true, as averred in the complaint, that the defendants obtained the sum of nine hundred and sixty-five dollars from the plaintiff by fraud and misrepresentation, and by the transfer of county warrants of no value, then the consideration upon which the money was paid has failed, and they have in their hands that sum of money which equitably belongs to him, and he has a right of action to recover the same. (*Kuntz v. Livingston*, 15 Cal. 344, and the cases therein cited.) A. purchased a land warrant, and being ignorant of its invalidity sold it to B. for a valuable consideration. The warrant was afterwards adjudged invalid: *held*, that B. could recover back the price paid. (*Boyd v. Anderson*, 1 Overton, 428.) A payment of a note was made in bills, one of which was afterwards discovered to be counterfeit: *held*, that the payee could recover from the payer the amount of such counterfeit bill. (*Young v. Adams*, 6 Mass. 182; *Markle v. Hatfield*, 2 Johns. 455.) The first count in the complaint, therefore, sets forth a cause of action, and the Court below erred in sustaining the demurrers.

The judgment is reversed and the cause remanded.

 REED *et al* v. CALDERWOOD *et al*.

IN an action of ejectment against several defendants the plaintiff may at any time before trial dismiss the action as to some of the defendants and proceed against the others alone.

C. being one of four defendants in ejectment, moved to transfer the action to a United States Court on the ground of his alienage, and an order was made staying all proceedings until the motion could be heard. Before the hearing of the motion plaintiffs dismissed the action as to C. and one other defendant, and took judgment against the other two, who had made default. C. afterwards insisted upon his motion, and filed affidavits tending to show that the

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defaulting defendants were occupying the premises as his tenants, and were colluding with the plaintiff. The motion was denied, and C. having appealed from that order and from the judgment: *held*, that the denial of the motion was proper, as after C.'s dismissal it could not properly be entertained.

Held, further, that C. was not in a position to contest by an appeal the validity of the judgment against the defaulting defendants—that if in entering the default and judgment there was collusion by which he was prejudiced, he should have moved in the Court below to set them aside and for leave to appear as landlord and defend.

APPEAL from the Fourth Judicial District.

The facts are stated in the opinion.

P. G. Buchan, for Appellants.

Hoge & Wilson, for Respondents.

CROCKER, J. delivered the opinion of the Court—COPE, C. J. and NORTON, J. concurring.

This is an action to recover the possession of a tract of land from the defendants Calderwood, Moore, Jacob and Theodore Rectowald. Calderwood appeared and filed a petition, setting forth that he was an alien, and praying that the suit be transferred to the Circuit Court of the United States for the Northern District of California. He also filed an undertaking with sureties, as required by the statute in such cases. Before the motion for the transfer was made, the time for the filing of answers expired, and the two Rectowalds, not having filed any answer, a default was entered against them by the Clerk, the plaintiffs dismissed the action as against Calderwood and Moore, and a final judgment for the possession of the property was rendered in favor of the plaintiffs against the defendants Jacob and Theodore Rectowald. After the rendition of the judgment, and after the dismissal of the action as to Calderwood and Moore, Calderwood brought on his motion to transfer the cause to the United States Circuit Court, and the Court denied the motion on the ground that the action had been dismissed as to the moving party, Calderwood, and the latter prosecutes this appeal against the judgment and the subsequent order refusing to transfer the action.

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The transcript is incumbered with a number of affidavits, which are not made part of the record by any statement or bill of exceptions. If there was collusion between the plaintiffs and the Rectowalds, who are alleged to be the tenants of Calderwood, the latter should have moved to set aside the default and judgment, and for leave to appear and defend as landlord, or taken some appropriate action in the Court below to secure his rights against the alleged collusion. (*Roland v. Kreyenhagen*, 18 Cal. 455.)

The plaintiffs had a right to dismiss the action as to Calderwood and Moore, leaving it to proceed against the other parties by the provisions of Sec. 148 of the Practice Act. No application having been made to set aside the default or the judgment rendered thereon, the appellant is not in a position to contest the validity or regularity of the judgment.

The action having been dismissed as to Calderwood, he was no longer a party to it, and his motion to transfer the cause could not, therefore, be properly entertained. Had he appeared, after the dismissal, and been made defendant, as landlord, upon his own application, the question would have assumed a very different shape.

As to the ultimate rights of these parties to the land in controversy, there is nothing properly in the record to enable us to determine them, even if the appellant had taken the proper steps to bring them before us.

The judgment and order are affirmed.

WRATTEN v. WILSON.

IN an action in a Justice's Court to recover personal property valued at less than two hundred dollars, the fact that plaintiff in his complaint prays a recovery, in addition to the property or its value, of damages in the sum of two hundred dollars, does not deprive the Court of jurisdiction. The prayer for damages may be stricken out or disregarded.

To justify the issuing of a writ of *certiorari* from the District Court, to review proceedings in an action which has passed to judgment in a County Court, on the ground that the latter Court had no jurisdiction by reason of the excess

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of the amount in controversy, the affidavit by the applicant must state the amount of the judgment rendered. The question of jurisdiction depends upon the amount of the judgment, and not upon the amount prayed for in the complaint.

APPEAL from the Seventh Judicial District.

The facts are stated in the opinion.

John Currey, for Appellant.

I. If it be conceded that the prayer is for a greater judgment than the Court had authority to grant, still that cannot determine the question of jurisdiction, because the plaintiff must recover, if at all, according to the averments of his complaint, and not according to what he may ask in the prayer of his complaint. (*Sterling v. Hanson*, 1 Cal. 478; *Benedict v. Bray*, 2 Id. 256; *Rollins v. Forbes*, 10 Id. 299.)

If the complaint had shown that the Justice's Court had no jurisdiction the defect could have been reached by demurrer, or by objection in the nature of a demurrer. But an objection to the prayer of a complaint cannot be taken by demurrer. (*Rollins v. Forbes*, 10 Cal. 299.)

In *Van Etten v. Gilson* (6 Cal. 19), the plaintiff sought, in a Justice's Court, to recover the possession of a mining claim, and in conjunction therewith, prayed for damages for injuries done thereto by defendant. This Court held that the Justice's Court had no jurisdiction to give damages for an injury to the claim, or for its detention. But the Court further said: "His prayer for damages might have been stricken out, or might have been disregarded. It ought not to have turned him out of Court. The rule is '*Utile per inutile non vitiatur*.'"

This decision was approved in *Grass Valley Mining Company v. Stackhouse* (6 Cal. 413).

So, in the case at bar, we say, if the prayer of the complaint was for an amount beyond the jurisdiction of the Justice's Court it ought to have been disregarded, and especially so, after verdict and judgment for less than the sum of two hundred dollars, and still more especially so as no objection was made respecting the jurisdiction of

the Justice's Court, or County Court, until after the two trials and verdicts in the action.

II. Upon the hearing, the District Court ought to have directed a *supersedeas* of the writ of *certiorari*; for, upon such hearing, it appeared by the record of the County Court in the case, that the proceedings and judgment sought to be reviewed were undetermined in the County Court, as an application for a new trial, on the part of defendant, involving the questions raised and passed upon in this District Court, was pending and undetermined in said County Court. (Rec. 81-38.)

That the District Court should have so directed, see (*The People v. Peabody*, 5 Abbott, 194; 26 Barb. 442; *Patchin v. Mayor of Brooklyn*, 13 Wend. 671; *Gray v. Schupp*, 4 Cal. 185; *Lynde v. Noble*, 20 Johns. 80).

If the County Court exceeded its jurisdiction in trying the action and giving judgment therein, it was competent to correct such error on the application to vacate the judgment which was pending before it when this writ of *certiorari* was granted; and it is to be presumed the County Court would, upon the application to vacate the verdict and judgment, have corrected any error that might have intervened, if any error existed. (*Linhart v. Buiff*, 11 Cal. 280.)

Hereford & Williams, for Respondent.

CROCKER, J. delivered the opinion of the Court—COPE, C. J. and NORTON, J. concurring.

This was an application to the District Court for a writ of *certiorari* to the County Court of Sonoma County. The affidavit of the defendant, Wilson, who applied for the writ, avers that one Boggs, a Justice of the Peace, rendered a judgment in the action in favor of the plaintiff against the defendant; that he appealed therefrom to the County Court, where judgment was again rendered against him; that the complaint in the action is for the recovery of personal property of the alleged value of one hundred and sixty-seven dollars and fifty cents, and it prays for judgment for the possession of the property, or the value thereof, to wit: one hundred and sixty-seven dollars and fifty cents, together with two hundred dol-

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lars damages and costs of suit. The District Court issued the writ and rendered a judgment reversing, setting aside, and annulling the judgment of the County Court, and for costs against the plaintiff, from which he appeals.

The affidavit on which the application for the writ of *certiorari* is founded is insufficient, as it does not set forth the amount of the judgments rendered either by the Justice of the Peace or the County Court. That was an essential fact necessary to be averred in order to show that they had exceeded their jurisdiction. The District Court, therefore, erred in granting the order for the writ. The proceedings before the Justice of the Peace and in the County Court were set forth in the return to the writ, by which it appears that the former rendered a judgment for fifty-seven dollars and fifty cents, and the latter for twenty dollars and costs. They did not therefore exceed their jurisdiction in rendering these judgments, and the mere fact that the plaintiff in his complaint prayed for the recovery of the property or its value, one hundred and sixty-seven dollars and fifty cents, with two hundred dollars damages and costs, did not render the judgments they entered an excess of jurisdiction. The prayer for damages might have been stricken out or disregarded. It ought not to have turned him out of Court. (*Van Etten v. Gilson*, 6 Cal. 19.) The District Court therefore erred in reversing the judgment.

The judgment of the District Court is reversed, and the proceedings relating to the writ of *certiorari* are dismissed at the cost of the respondent.

GLUCKAUF v. REED.

THE right which a party acquires to public land by possession and occupancy may be lost by abandonment. An abandonment divests the title as fully as a conveyance.

An abandonment of a possessory right to land may be inferred from disuse and cessation of occupancy.

The rule that a party by failing, under certain circumstances, to assert his title to property is thereby estopped from saying that he had title, does not extend so far as to debar him from asserting an *after-acquired* title.

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Where the defendant in an action of ejectment relies upon an abandonment by plaintiff of a title once held by him and a subsequent taking of possession by himself, the rules of law relating to adverse possession, have no relevancy, whatever may have been the relation of defendant to the title claimed to have been abandoned.

The abandonment destroys the title and all its relations, and the subsequent possession of defendant is a new and independent right.

APPEAL from the Fifteenth Judicial District.

The facts appear in the opinion.

J. E. N. Lewis, for Appellant.

I. Defendant having received the benefit of the partition between him and Danforth, cannot deny its validity. By afterwards assenting to the sale to Eaton, without asserting any title in himself, he is estopped from denying Eaton's title.

II. Defendant's possession was obtained from plaintiff's grantor, and is not, therefore, an adverse possession. If he afterwards claimed adversely, his possession under such claim was not of the character or continued for a sufficient length of time to enable him to gain a title thereby. (*Livingston v. Penn. Iron Co.*, 9 Wend. 511; *Hawks v. Seuseman*, 6 Serg. & Rawle, 21; *Jackson v. Schoomaker*, 2 Johns. 230; *Baronett v. Ogden*, 1 Id. 230; *Doe v. Campbell*, 12 Id. 365; 13 Id. 118; 2 Caine, 183; 1 Id. 444; 3 Johns. 498; 16 Id. 293.)

III. The evidence did not warrant the Court in finding an abandonment by plaintiff.

Smith & Rosenbaum, for Respondents.

CROCKER, J. delivered the opinion of the Court—COPE, C. J. and NORTON, J. concurring.

This is an action to recover the possession of a lot in the town of Oroville. The plaintiff's title is founded upon the prior possession of one Eaton, who conveyed to him. The defendant denies the prior possession of Eaton, avers that the plaintiff and those from whom he claims have not had any possession of the property within five years before the commencement of the action, and that he has

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been in possession for over seven years. The plaintiff in his replication denies the new matter alleged in the answer, and avers that one Danforth was formerly in possession and sold to Eaton, and that the defendant assisted Danforth in selling to Eaton, was present when the sale and conveyance was made, and fraudulently remained silent, and concealed his interest, if any he had, from Eaton, and he is therefore estopped from setting up any claim.

The case was tried by the Court, who found the following facts: That in 1855, Reed and Danforth took up a tract of land, of which the premises in controversy formed a part, cleared off the brush and piled it around the tract, thus forming a partial inclosure; soon after, they agreed to divide the tract, Reed to take the east and Danforth the west half, but no division line was run or fence made. In October, 1855, Danforth sold his portion to Eaton in connection with some mining claims near by, who took possession, and used the cabin on it for his workmen up to February, 1857, when he ceased to occupy it, or any one under him. There was no inclosure around the lot at that time nor was it cultivated. In March, 1861, plaintiff purchased the right of Eaton, and February 20th, 1862, commenced this action. Reed entered into possession as early as 1859, and has remained in the quiet possession ever since. The Court held that the possession had been abandoned by Eaton, and that it was vacant land at the time of the defendant's entry, and therefore rendered judgment for the defendant, from which, and from an order refusing a new trial, the plaintiff appeals.

It is urged that the findings of the Court are not supported by the evidence. After a careful examination, we think the evidence sustains the findings. When Eaton abandoned the possession he ceased to have any right, title, or interest in the property, and the defendant or any other person had the right to enter and take possession, and such possession would vest in him the right of possession, as against Eaton, or any one claiming under him. The estoppel plead by the plaintiff, if fully proved, could not affect this after-acquired right of the defendant. Under some circumstances, the failure of a party to assert his title to property will be held to estop him from saying, at any time thereafter, that he had any title, at that time, as against a person who would be injured thereby,

Keller v. Sutrick.

or one claiming under him. But this rule does not extend so far as to debar him from asserting an *after-acquired* title. The reason of the rule ceases entirely when applied to such a case.

The rules of law relating to titles acquired by adverse possession have no application to this case. The right of Eaton, acquired by his possession, was of such a character that it was liable to be divested or lost at any time by mere abandonment. When once divested in this way, the right was gone from him, as much so as if he had made a conveyance of the property. The defendant, by entering upon and taking possession of the abandoned property, acquired a new right of possession, entirely independent of all other claims of title, and his right to the possession is superior to the claim of Eaton, and the plaintiff under him. The right which Eaton once had by priority of possession had been lost by abandonment, and it matters not whether the defendant's possession had existed for one day or for five years before suit brought; it is the better right.

Judgment affirmed.

KELLER v. SUTRICK.

THE provision of Sec. 187 of the Practice Act, as to the time within which a referee must file his report, is merely directory. A failure to file within the time will not invalidate the report or the judgment rendered thereon.

▲ finding of fact by a referee will not be set aside where the evidence is conflicting.

APPEAL from the Twelfth Judicial District.

The facts are sufficiently stated in the opinion.

Samuel Platt, for Appellant,

Contended: 1st, that the evidence clearly showed an express warranty, to constitute which no precise words are necessary where the intention to warrant appears (5 Cal. 473; 3 Kent's Com. 480); 2d, that the report of the referee not having been filed until more than ten days after the closing of the evidence was thereby vitiated, and could not be made the basis of a judgment. (Practice Act, Sec. 187.)

Delany & Booraem, for Respondent.

I. The provision of Sec. 187 of the Practice Act, in reference to the time within which a referee must file his report, is merely directory. Sec. 191 of the Practice Act provides, that when the report is not made immediately after the closing of the testimony it shall be deemed excepted to; clearly showing that the limitation in Sec. 187 was not imperative.

When a cause is referred the referee holds the position formerly held by the Court, and all the acts of the referee are subject to the same discretionary power held by the Court. And this Court has decided that the Court below is not compelled to find and file its conclusions within the ten days provided by statute, the provision as to time being declared directory. (*Vermule v. Shaw*, 4 Cal. 214.)

II. The decision of a referee, upon a question of fact, will be treated on appeal like the verdict of a jury, and will not be interfered with where the evidence is conflicting. (*Gunter v. Sanchez*, 1 Cal. 45; *Walton v. Minturn*, Id. 362; *Ritchie et al. v. Bradshaw*, 5 Id. 229; *Knowles v. Joost et al.*, 13 Id. 620.)

III. Upon a sale of chattles, if there be not an express warranty, the doctrine of *caveat emptor* obtains. The vendee purchases at his peril and has no redress for a defect of quality. (2 Kent's Com. 478; 2 Caines, 48; 20 Johns. 196; Hill on Sales, 224; *Hart v. Wright*, 17 Wend. 267; S. C. in 18 Id. 149; *Salisbury v. Steiner*, 19 Id. 159; *Moses v. Mead*, 1 Denio, 378; *Moore v. McKinley*, 5 Cal. 471.)

CROCKER, J. delivered the opinion of the Court—COPE, C. J. and NORTON, J. concurring.

This is an action to recover the sum of \$1,075, the price of a quantity of grapes sold by the plaintiff to the defendant. The defense is, that the plaintiff, by his agent, expressly warranted the grapes sound and in good condition; that they were not sound, and he notified plaintiff's agent to take them back, which he refused to do. These averments are denied in the replication. The defendant sold the grapes for seven hundred and twenty-nine dollars and

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thirty-five cents, and tendered it to the plaintiff. The case was referred, the referee filed his findings and report in favor of the plaintiff, and judgment was rendered accordingly, from which, and the order refusing a new trial, the defendant appeals.

The first error assigned is that the findings of the referee are contrary to the evidence. We have examined the evidence carefully and find it very conflicting, especially upon the main question, whether there was an express warranty. We do not think it presents such a case as would justify us in setting aside the findings of the referee, who heard the witnesses testify, and is therefore better able to judge of the weight which their testimony is entitled to.

The next error assigned is that the report of the referee was not filed within ten days after the testimony was closed, as required by Sec. 187 of the Practice Act. The testimony was closed July 23d, and the report was not filed until September 5th. This provision, as to the time within which the referee must file his report, we regard as merely directory; and a failure to file within the time prescribed cannot have the effect of invalidating the report or the judgment rendered thereon. No such consequences are declared by the statute. (*Vermule v. Shaw*, 4 Cal. 214.)

The judgment is affirmed.

URIDIAS v. MORRILL.

Nothing in our State Constitution prohibits the Legislature from declaring the Mayor of a city to be *ex officio* a Justice of the Peace, and under such a law the same person may constitutionally exercise the functions both of Mayor and Justice.

The express permission, in Sec. 1, Art. 6 of the Constitution, to establish *Municipal Courts* is within the exception to Art. 3 respecting the division of powers in the Government. The term "Municipal Courts" has a legal meaning, and includes Mayors' and Recorders' Courts.

The Constitution not having defined the jurisdiction of the Municipal Courts authorized to be established, it is left to be regulated by the Legislature under its general powers. These powers are not exceeded by conferring upon a Mayor the authority and jurisdiction of a Justice of the Peace.

APPEAL from the County Court of Santa Clara County.

The facts are stated in the opinion.

Ryland, Williams & Yoell, for Appellant.

The Mayor of San José is by law *ex officio* Justice of the Peace, with powers, and duties, and responsibilities of such Justices as may belong to a Justice of the Peace of the township of San José. The Legislature, in doing this, has violated no clause of our State Constitution. The Mayor of San José is not an executive officer under the third article of the Constitution. That article was never intended to apply to such an officer, and if it were, the Legislature, under the other sections of the Constitution, has full power to control such officers and such matters. (*Santo v. State of Iowa*, 2 Iowa, 220.)

Governments of cities and towns are molded and remolded as the Legislature may deem expedient. The powers, and the persons or officers who are to exercise those powers, and which are intended to be separated and distributed by the third article of the Constitution, are not controlled by the Legislature. Each branch of the Government divided by said article gets its powers from the Constitution, and each is in a certain extent independent. Not so with city or town governments. They are the offspring, as it were, of the Legislature, and are managed and controlled by it; changed, modified, abrogated, or abolished and renewed, as the Legislature chooses, under the general power to establish town organizations, and to distribute the powers thereof. The powers exercised by such governments are all derived from the Legislature, and without express or necessarily implied powers the city or town governments cannot act. Why, then, cannot the Legislature say that a Mayor of a city shall act as *ex officio* Justice of the Peace to decide upon the violations of city ordinances? and if he can decide upon the violations of city ordinances, why not act as any other Justice of the Peace? If the Mayor cannot perform any judicial act because he is an executive officer of the town, how can he preside at any of the meetings of the Council, and by what right can he vote in case of a tie or veto when he is opposed to a bill? These are legislative acts. To vote on the passage of a law is the highest legislative

act, and yet there is not a Mayor in the State of California but what is clothed more or less with legislative as well as executive powers and duties ; and if respondents are right, the various laws authorizing them so to do are unconstitutional, and all laws and ordinances passed by their votes are void.

This doctrine of the distribution of powers is attempted to be carried too far. Judges of the various Courts are authorized to take acknowledgments to deeds, depositions, affidavits, administer oaths, etc. So are the Recorders, County Clerks, and Notaries Public authorized to perform the same acts, and yet both are sustained. Now if such acts be judicial, what right has the Recorder, County Clerk, or Notary to perform such acts ? The Recorder is not a judicial officer.

In the case of the *People v. Brooks* (16 Cal. 39) the Supreme Court decided that where discretion exists the power of each department is absolute, and that the Legislature can pass such laws as it may deem expedient, subject only to the prohibition of the Constitution, etc., and that when it passes over these limits its power for good or ill is gone.

It is further decided that there is nothing in the distribution of powers which places either department above the law, or makes either independent of the others. It simply provides that there shall be separate departments, and it is only in a restricted sense that they are independent of each other. If that be the law in reference to the State departments, the very departments which the framers of the Constitution intended to be separate and independent, how much more is that the case in reference to the matters left almost entirely within the power, discretion, and control of the Legislature.

To carry the doctrine to the extent contended for by respondents, in the Court below, would be ruinous ; it would clog the wheels of Government immediately. All acts of life are so minutely connected, one with another, that it is impossible to separate them without affecting those which precede and succeed. So it is with most of the acts of Government. They cannot be separated. They hinge one upon another, and are intended by the framers of the Constitution to dovetail in so that we may have one harmonious

whole. The true meaning of the Constitution is, that the whole power of one of these departments shall not be exercised by the same hands which possess the whole power of either of the other departments. (*People v. Brooks*, 16 Cal. 40.)

F. E. Spencer and *A. L. Rhodes*, for Appellant.

All offices of the Government, not only those provided for in the Constitution, but those created by the Legislature also belong to one of the three departments of Government. (*McCauley v. Weller*, 16 Cal. 40.) The main, primary, duties of the Mayor of a city are executive in their character. The corporation of the city is so constituted that the services of the Mayor, in his executive capacity, are indispensable to the working of the municipal government, and the corporation could have no vitality without the executive services of such an officer.

All of the duties of the Mayor of San José as enumerated in the charter, except the judicial functions conferred upon him *ex officio* by the ninth section, are executive, and so essential in their character that the municipal government must entirely fail, if he should be deprived of his executive powers, in order that he might properly discharge judicial powers.

The decisions of the Supreme Court upon the question of the exercise of executive powers by judicial officers have been uniform against the constitutionality of the acts conferring such powers. (*Burgoyne v. Supervisors*, 5 Cal. 9; *Dickey v. Hurlburt*, Id. 343; *People v. Town of Nevada*, 16 Id. 143.)

The question in this case is not whether the several departments of Government are independent in all respects, for it is admitted that they are not; nor is it whether certain officers can be authorized by law to discharge certain duties, the precise nature of which it is difficult to determine, they partaking of those of two or more of the departments of Government—as the approving of bonds and the taking of acknowledgments of deeds by the Judges, or the laying out of roads by Boards of Supervisors, or the veto power of the Mayor of a city. Nor does the question relate to the powers of the Legislature to establish a municipal government and prescribe the duties of its officers, but conceding that the Legislature

may create municipal offices with duties of a mixed character like those of a Supervisor, and in view of the fact that the duties of a Justice of the Peace in the trial of actions, as actions for the unlawful detainer of lands, are purely judicial, the question is, can such judicial duties and functions be conferred upon the Mayor of a city (who under the provisions of the charter is the chief executive officer of the city) under the provisions of the Constitution authorizing the Legislature to establish a city government?

If the propositions of the appellant can be maintained, and his arguments are sound, there is no restriction upon the Legislature in organizing municipal corporations, and there can be no good reason why the powers usually conferred upon Mayors cannot be exercised by a Justice of the Peace, or why the Mayor could not be vested with appellate powers, or why the Common Council could not be constituted a Court to try cases for the violation of their own ordinances, or why the Mayor, Marshal, and Assessor could not be constituted the legislative branch of the city government.

CROCKER, J. delivered the opinion of the Court—COPE, C. J. and NORTON, J. concurring.

This is an action for the unlawful holding over of land brought before the Mayor of San José, who is by law *ex officio* Justice of the Peace. The defendant demurred to the complaint on the ground that the Court had no jurisdiction, claiming that the law conferring judicial powers upon the Mayor was in violation of Art. 3 of the Constitution. The Mayor overruled the demurrer, the case was tried, and a judgment rendered for the plaintiff, from which the defendant appealed to the County Court, where he moved to dismiss the action on the same ground. The County Court sustained the motion, dismissed the action, and rendered a judgment in favor of the defendant for costs, from which the plaintiff appeals.

The Forcible Entry Act gives Justices of the Peace jurisdiction to hear and determine actions of this character. Sec. 9 of the act incorporating the City of San José, provides that the Mayor shall, *ex officio*, be a Justice of the Peace within and for the township of San José, with the same power and jurisdiction as is conferred by law upon Justices of the Peace, both in criminal and civil cases.

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(Statutes of 1859, 111.) Article 3 of the Constitution of this State reads as follows: "The powers of the Government of the State of California shall be divided into three separate departments: the legislative, the executive, and the judicial; and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any functions appertaining to either of the others, except in the cases hereinafter expressly directed or permitted." It is insisted that the Mayor of San José holds an office pertaining to the executive department of the Government of the State of California, that he cannot therefore exercise any functions appertaining to the judicial department, and that this provision of the Act of 1859, which attempts to confer such powers upon him, is unconstitutional and void.

This third article of the Constitution excepts such cases as are hereinafter expressly directed or permitted. Article 6, Sec. 1, provides that "the judicial power of this State shall be vested in a Supreme Court, in District Courts, in County Courts, and in Justices of the Peace. The Legislature may also establish such *municipal* and other inferior Courts as may be deemed necessary." The term "Municipal Courts" has a legal meaning and significance, and clearly includes Mayors' and Recorders' Courts, as those were well known and universally recognized as being of that character. The office of Mayor was one in which the same person exercised the mixed duties of an executive and judicial officer, and comes within the exception of Art. 3. The Constitution has not defined the jurisdiction of such Courts, and it is therefore left to be regulated by the Legislature under its general powers. The act in question does not confer upon the Mayor of San José any jurisdiction which is by the Constitution vested in any other Court, and the Legislature has not therefore exceeded its powers in conferring upon him the same powers and jurisdiction as a Justice of the Peace. The principles laid down in the case of the *People v. El Dorado County* (8 Cal. 58) are applicable to the present question. The case of *Santo v. The State of Iowa* (2 Iowa, Clarke, 220) is also directly in point. In our judgment the act in question is constitutional and valid.

The judgment is reversed, and the cause remanded for further proceedings.

JOHNSON *et al.* v. THE WIDE WEST MINING CO.

NOTICE of an application by plaintiff for an injunction must be given for the length of time presented by Sec. 517 of the Practice Act. If given for a shorter time and defendant does not appear, he may treat an injunction thus obtained as granted without notice, and move to dissolve the same under Sec. 118.

Where a motion to dissolve an injunction is heard upon the pleadings alone, it should not be granted if the answer denies all the material allegations of the complaint.

APPEAL from the Sixteenth Judicial District.

The facts are stated in the opinion.

Phelps & Pawling, for Appellant.

J. R. McConnell and *Sterns & Morse*, for Respondents.

CROCKER, J. delivered the opinion of the Court—COPE, C. J. and NORTON, J. concurring.

This is an appeal from an order refusing to dissolve an injunction restraining the defendants from working a certain ledge of silver ore in Mono County. The complaint was filed on the seventeenth day of July, 1862, and notice was given to the defendant, at half-past ten o'clock, A. M., that the plaintiffs would apply for an injunction at two o'clock, P. M., of the same day. The defendants failed to appear at the time fixed by the notice, and the injunction was granted upon the verified complaint. The defendants served and filed their answer, duly verified, denying all the material allegations of the complaint, on the twenty-first day of July. They notified the plaintiffs on the eighteenth that they would, on the twenty-third day of July, move to dissolve the injunction on the complaint and the answer thereto. The parties appeared, the plaintiffs filed their replication to the answer, the motion was submitted upon the pleadings, and the Judge refused to dissolve the injunction.

The notice of the motion for an injunction having been only a few hours, was entirely insufficient under Sec. 517 of the Practice Act, and the defendants not having appeared to the motion, the order granting the injunction is to be deemed to have been made without

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notice, and the defendants had the right to apply to the Court to dissolve it. The answer of the defendant denies all the material allegations of the complaint on which the injunction was granted, and the complaint being entirely unsupported by any affidavits or other proof, the Judge erred in refusing to dissolve the injunction.

The order granting the injunction is dissolved.

GALLUP v. ARMSTRONG.

WHERE the plaintiff in ejectment seeks to establish a prior possession under a land warrant location, the patent issued to him in pursuance of the location after the commencement of the action is admissible as evidence in his favor to show the date and location of the warrant, and that his right of possession thereunder has since ripened into a perfect title.

A patent issued by the Government is admissible in evidence, without any proof of its execution. The official seal sufficiently authenticates it.

APPEAL from the Thirteenth Judicial District.

The facts are stated in the opinion.

P. L. Edwards, for Appellants.

John Reynolds, for Respondent.

CROCKER, J. delivered the opinion of the Court—NORTON, J. concurring.

This is an action for the recovery of the possession of a tract of land. The case was tried by a referee, who reported in favor of the plaintiff, and judgment was rendered accordingly, from which and from an order refusing a new trial, the defendant appeals.

It is objected that under the pleadings the plaintiff was not entitled to any damages which may have accrued prior to the commencement of the suit. A full answer to this is, that the record shows that the referee only found the damages since the commencement of the suit.

On the trial the plaintiff proved his possession of the premises

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prior to the entry of the defendant, and also that he had located a military land warrant on the tract ; and he then offered in evidence, for the purpose of showing the date and location of the land warrant, a patent from the United States, issued to the plaintiff under and in pursuance of such location—dated, however, after the commencement of the suit, the warrant itself having been surrendered upon the issuing of the patent. The defendant objected to it on the ground that it did not show any title in the plaintiff at the commencement of the action, and that it had not been certified to and recorded under the laws of this State. The referee overruled the objections, and defendant excepted, and this is assigned as error. The plaintiff was bound to show a right to the possession of the land at the commencement of the suit, and this he did by proper evidence. It seems that one of his claims to the possession was founded on the location of a land warrant prior to the commencement of the action, and we see no valid objection to the admission of the patent for the purposes for which it was offered. It was not offered to prove a right of possession acquired since the commencement of the suit. If it had been offered or used for such a purpose it would have been inadmissible. But it was competent for the plaintiff to prove that the right of possession acquired by the location of the land warrant had since ripened into a perfect title, even though it occurred since the commencement of the action.

A patent issued by the government is admissible in evidence without any proof of its execution. The official seal of the government sufficiently authenticates it. The third and fourth sections of the Act of 1857 (Wood's Digest, 249) provide how a patent may be authenticated so as to be admitted to record in the Recorder's office, and makes certified copies of such record evidence, but this does not affect the admissibility of the *original* patent as evidence.

The judgment is affirmed.

Hilborn v. Alford.

HILBORN v. ALFORD.

THE execution of a promissory note, signed with an \times or mark, may be proved by evidence of admissions of the alleged signer, in the absence of any attesting witness.

APPEAL from the Seventh Judicial District.

The note sued on was signed with the names "Thompson & White," and underneath their joint names was written the name of L. Alford, with a cross between the initial L. and the surname, with the word "mark" written beneath the cross. There was no attesting witness to the alleged signature of Alford. The plaintiff and two other witnesses testified to conversations had with respondent, Alford, subsequent to the date of the note in which he recognized his liability to pay it, and urged plaintiff to relieve him (Alford) by collecting it from Thompson & White.

Alford himself testified, that he did not put his mark to the note or authorize it to be done. There was no proof of the execution, except the admission of Alford.

John Currey, for Appellant.

In Parson's Treatise on Promissory Notes and Bills of Exchange, the learned author says: "The signature by mark is admitted from necessity; but we think it should be declared and attested at the time, in writing, as the mark of the maker, although it may not be quite certain that the law requires this." (1 Parsons on Prom. Notes and Bills, 23; 2 Id. 16.)

Judge Story says the signature of the maker of a promissory note "must be in the handwriting of the party executing it, or if it be by the mark of the maker, that mark must be verified by the handwriting or attestation of some person, "who acts for the marksman, or attests it at his request." (Story on Prom. Notes, Sec. 11.)

In Edwards on Bills of Exchange and Promissory Notes, page 150, it is said, a person may "execute an instrument and bind himself as effectually by his initials as by writing his name in full. And he may use figures as a mark in lieu of his proper name," and

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at page 251, the same author says, "When the payee's name is written in full in the body of the instrument, it is held that he may transfer it by making his mark or writing his initials on the back, provided it is shown that they were used as a substitute for his name."

Though it were conceded that an attesting witness to the execution of a note by the mark of the maker, is not indispensable to the proof of it, yet it may be said on high authority that a note so executed should be attested by a subscribing witness, and is usually so attested; and that the want of a subscribing witness in such a case, properly subjects it to suspicion and rigid scrutiny. (1 Parsons on Notes and Bills, 23.)

None of the cases cited by Mr. Parsons and Mr. Edwards, showing that a note or bill signed or indorsed by a mark or other sign, may be proved where there is no subscribing witness, go so far as to dispense with proof that the party charged executed the note or bill, on which the action was brought.

Whitman & Wells, for Respondent.

The admissions of defendant, Alvord, were competent evidence to show the execution of the note. (*Hall v. Phelps*, 2 Johns. 450; 2 Parsons on Bills, 477; 3 Phillips on Ev. 6th Am. Ed. 10.)

A part payment, or promise to pay, or asking time, dispenses with the necessity of proving the execution of a note. (3 Phil. Ev. 6th Am. Ed. 10, and Note 40; 2 Parsons on Bills, 479, 486; Chitty on Bills, 9th Am. Ed. 626.)

CROCKER, J. delivered the opinion of the Court—NORTON, J. concurring.

This is an action upon a promissory note, executed by Thompson & White, and purporting to be executed by the appellant by his mark. The defendant, Alford, denied under oath the execution of the note by him, and that was the only issue. The case was tried by the Court, a jury being waived, who found for the plaintiff, and the defendant, Alford, appeals from the judgment rendered thereon, and from an order refusing a new trial.

Kittle v. Pfeiffer.

The only error assigned is that the finding of the Court is against the law and evidence; that the evidence is insufficient, considering its character and all the circumstances, to prove the execution of the note by the defendant. We have carefully examined the evidence and are satisfied that it is sufficient to prove the fact in issue. It is true there was no attesting witness to the signature, but that is not indispensable. The execution may be proved by competent testimony in the absence of an attesting witness. (*George v. Surrey*, 1 Moody & Malkin, 516.) And even when there is a subscribing witness to a promissory note, it has been held that the admissions of the party of the execution of the note is as high proof as that derived from a subscribing witness. (*Hall v. Phelps*, 2 Johns. 451; *Mauri v. Hefferman*, 13 Id. 75.) So it is held that the declarations of the maker of a note may be resorted to, to prove the execution of the instrument, whenever proof of his handwriting can be resorted to. (2 Phil. Ev., C. H. & E.'s Notes, 441.) The proof in this case consists entirely of the admissions of the defendant made to the plaintiff and two other witnesses, and we deem them sufficient to sustain the findings of the Court.

The judgment is therefore affirmed.

KITTLE v. PFEIFFER *et al.*

P. EXECUTED to the City of San Francisco a quitclaim deed of certain strips of land to be used as public highways, under the name of "Belle Air Place" and "Pfeiffer Street," the same being part of a city lot occupied by himself wife as a homestead. Afterwards, the parcels thus sold never having been and opened or used as highways, P. and wife executed a mortgage upon their homestead, describing it as bounded in part by a line running a certain course and distance "to Belle Air Place," and thence a certain course and distance "to Pfeiffer Street." The mortgaged premises having been sold under a decree of foreclosure in an action to which the husband and wife were parties, and the plaintiff having acquired the title of the purchaser, the mortgagors commenced to erect a building upon the spaces designated as streets, claiming that the same remained a part of their homestead and had not been dedicated as highways. In an action by plaintiff to enjoin this work: *held*, that as to the mortgagees and those claiming under them, the mortgage was a dedication of the streets named as public highways, and vested in them a right of way; that the deed to the city might be referred to, to show the width of these

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streets; that the homestead claim was barred by the foreclosure and sale; and that the right of way passed to the purchasers as an appurtenance of the lot, and therefore free from the claim of homestead.

Injunction is the proper remedy to stay a threatened injury to a right of way.

Where land is described in a conveyance as running to a certain street, without other qualifications, the fee passes to the center of the street.

Where lots are sold as fronting on or bounded by a certain space designated in the conveyance as a street, the use of such space as a street passes as appurtenant to the grant and vests in the grantee in common with the public the right of way over the same.

APPEAL from the Twelfth Judicial District.

The facts are stated in the opinion of the Court.

W. W. Stow, for Appellant.

I. By the execution of the deed to the city, Pfeiffer, the husband, so far as he could, dedicated Belle Air Place and Pfeiffer Street, as public streets to the public use. (1 Smith's Leading Cases, 180, 181; 11 Id. 188.)

II. The mortgage of Pfeiffer and wife to plaintiff's testator was duly executed and acknowledged by defendants, and the decree of foreclosure and deed under it preclude them from claiming a homestead in any part of the lands embraced thereby. (*Gee v. Moore*, 14 Cal. 477; *Bowman v. Norton*, 16 Id. 217.)

The decree of foreclosure, Sheriff's deed, etc., is conclusive that defendant had no homestead right in the mortgaged premises. (1 Johnson's Cases, 492; 1 Bailey, 533.)

III. The mortgage from defendants was a covenant to keep Belle Air Place and Pfeiffer Street forever open as public streets, for the convenience of plaintiff and his testators. (*Bissell v. N. Y. Central Railroad Co.*, 23 N. Y. Court of Appeals, 85; S. Smith's Leading Cases, 188; 1 Id. 180, 181.)

John F. Swift, for Respondents.

I. The deed alone could not create a highway so as to make buildings remaining in the contemplated street a public or private nuisance. There must be some act on the part of the city to take possession of the way, and an actual opening to the public, before the so-called streets could become a highway.

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The streets so-called were at the time of the alleged grant the homestead of Pfeiffer and wife, and have ever since continued to be. The wife did not join in the deed, and as a consequence the grant was subject to the homestead rights of the respondents. (*Gee v. Moore*, 14 Cal. 472.) The city could not obtain possession of the land for the purposes of a street, or at all while it was so used.

II. The mortgage by Pfeiffer and wife passed no part of the so-called streets, but on the contrary, by express measurement (to wit, one hundred and twenty-two feet six inches) conveyed only to the outer edge of the street. The mortgage description conveys by measurement one hundred and twenty-two feet six inches south from the southerly line of Francisco Street to Pfeiffer Street, and one hundred and twenty-two feet six inches east from Stockton Street to "Belle Air Place." The jury and also the Court find as a fact, that the homestead of respondents, and which homestead is the very land claimed by appellants to be the so-called streets, commences one hundred and twenty-two feet six inches south from Francisco Street and one hundred and twenty-two feet six inches east from Stockton Street, and extends southerly and easterly. This, in fact, being the identical land claimed by appellants as streets.

Now, admitting the law to be that the conveyance of land bounded in general terms on a street, conveys the fee of the land to the center of the street (which is, to say the least, doubtful), here is an express exclusion of such an intent, by conveying by measurement in feet and inches, which measurement only goes to the outer edge of the street. In such cases, it has always been held that such measurement, showing an express intention to go to the edge of the way and no further, leaves the fee of the street in the grantor. (*Jackson v. Hathaway*, 15 Johns. 447; 1 Sumner, C. C. 21; 11 Pick. 194; 5 Wharton, 18; 2 Metcalf, 147; Notes to *Doraston v. Payne*; Smith's Leading Cases, 90.)

III. The land claimed for a street for the convenience of plaintiff, long before, at the time of, and ever since the making of the mortgage, was and is the homestead of the defendants, Pfeiffer and wife. The implied covenant in the mortgage is to be regarded

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as a nullity, so far as the wife is concerned, and is precisely as if the husband had made such a covenant in a separate instrument. It would be subject to the right of homestead, which would continue in full force and unaffected by the covenant. The covenant could not bind the wife for any purpose. A married woman is incapable of making a covenant. (Bac. Ab. Tit. "Barron and Feme," 17 Johns. 167.) At common law she could not pass her estate except by a fine. Our statute has provided as substitute for the fine in a deed and acknowledgment; but this can go no further than the fine at common law, to wit: to convey her property. Our statute provides a certain mode of conveying the wife's property, and that her covenants shall not bind her. (Wood's Dig. Arts. 356, 357, p. 102.) A wife's covenant to convey her property, though founded upon valuable consideration and with the consent of her husband, is void at law and will not be upheld in equity. (3 Shepley, 304; 2 Kent's Com. 167 and notes; 17 Johns. 167.)

The implied covenant arising from describing land as abutting upon a street, does not create a street or way, or vest any estate in the covenantee, but is a mere collateral agreement. In this case, it is the covenant of the husband to permit certain land to be used as a street, which land had never been so used up to that time. In other words, an implied covenant to allow a street to be opened. Upon the husband's breach of this covenant, the covenantee has two remedies, to wit: 1. An action at law for damages; and 2. A suit in equity for specific performance.

CROCKER, J. delivered the opinion of the Court—COPE, C. J. and NORTON, J. concurring.

This is an action to enjoin the defendants from erecting and constructing buildings and other obstructions in certain streets in the City of San Francisco, known as "Belle Air Place" and "Pfeiffer Street." The Court below, after the trial of the issues raised by the parties, rendered a judgment dismissing the complaint, and for costs against the plaintiff, from which he appeals.

From the record in this case it appears, that on the twenty-fourth day of October, 1854, J. L. Folsom and the defendant, William A. Pfeiffer, conveyed, by quitclaim deeds, to the City of San Fran-

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cisco, certain strips of land, to be forever kept open as public highways, under the name of "Belle Air Place" and "Pfeiffer Street," which deeds were duly recorded; that on the first day of October, 1855, the defendants, Pfeiffer and wife, mortgaged to the plaintiff's testators, fifty-vara lot numbered 1,494, described as commencing at the south-east corner of Stockton and Francisco streets; running thence easterly one hundred and twenty-two feet and six inches to "Belle Air" Street; thence southerly along Belle Air Street one hundred and twenty-two feet six inches to "Pfeiffer" Street; thence westerly along Pfeiffer Street to Stockton Street; thence to the place of beginning—to secure the sum of ten thousand dollars; that the mortgage was duly acknowledged and recorded, and on the — day of February, 1857, the plaintiff's testators obtained a decree against said defendants, Pfeiffer and wife, foreclosing the mortgage, under which decree the mortgaged premises were duly sold and purchased by and finally conveyed to, plaintiff's testators, who went into possession under the Sheriff's deed, and they and the plaintiff have continued in possession ever since; that there is on the lot a brick building erected by Pfeiffer, standing on the corner of Francisco Street and Belle Air Place, with windows to light the same opening on Belle Air Place; and that the defendants commenced the erection of a building within the boundaries of Belle Air Place, along side of said brick building and obstructing said windows, and have also erected buildings and obstructions on Pfeiffer Street, and they threaten to inclose and totally obstruct said streets.

It also appears by the findings of the Court that the City of San Francisco or the public never accepted said conveyances, and that said strips of land were never opened or used by the city or public as streets or highways. It also appears that prior to these deeds to the city, the defendants occupied the two fifty-vara lots 1,493, and 1,494, which include the premises claimed as streets, residing thereon with their family, claiming the same as a homestead; that the wife never executed the deeds to the city, and they claim the premises as their homestead.

The Court below found from these facts that the tracts claimed to be streets never were created and never existed as public or

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private streets; that the mortgage, so far as it related to these streets, bound the husband only, and not the wife, and did not create any street or way, and that the premises were the homestead of the defendants, and therefore the plaintiffs had no right of action.

The principal question involved in this case is, what acts are necessary to constitute a dedication of land to public use. The principal uses to which lands may be applied for public purposes, and to which the doctrine of dedication is applicable, are for roads, streets, alleys, squares, landings, cemeteries, and the like. Such dedication may be without any grant or conveyance. (*Abbott v. Mills*, 3 Vermont, 526; *State v. Catlin*, 3 Id. 533; *Vick v. Vicksburg*, 1 How. Miss. 379.) And where made by grant or conveyance, they are valid, even though there be no grantee *in esse* at the time, to whom the fee could be conveyed. (*Pawlet v. Clark*, 9 Cranch, 292; *Cincinnati v. Lessees of White*, 6 Pet. 431; *Beatty v. Kurtz*, 2 Id. 566; *New Orleans v. The United States*, 10 Id. 662; *Kennedy v. Jones*, 11 Ala. 63; *Brown v. Maning*, 6 Ohio, 303.) So a sale of lots by the owner according to a map or plan of a city or town, on which streets, squares, and landings are marked out, is held a dedication to public use of such streets, etc. (*Irwin v. Dixon*, 10 How. U. S. 81; *Wyman v. The Mayor of New York*, 11 Wend. 486; *The People v. Lambier*, 5 Denio, 9; *Rowan v. Portland*, 8 B. Monroe, 232.) These principles have also been held to apply to strips of land bordering upon navigable streams, in front of towns or cities, and which have been left or marked upon the town plat, as streets or public landings. (*Barclay v. Howell's Lessee*, 6 Peters, 498; *Rowan v. Portland*, 8 B. Monroe, 232; *Newport v. Taylor*, 16 Id. 699; *Cincinnati v. Lessees of White*, 6 Peters, 431; *Vick v. Vicksburg*, 1 How. Miss. 379.) A sale of lots described as bounding on certain streets, of itself is held as a dedication of the street to public use, without any further act. (Ang. on Highways, Sec. 142; *Abbott v. Mills*, 3 Vermont, 526; *Matter of Thirty-Ninth Street*, 1 Hill, 192; *Matter of Thirty-Second Street*, 19 Wend. 128.) And the dedication is the same whether the lot is bounded by the center of the street or the side of it. (*Matter of Thirty-Ninth Street*, 1 Hill, 192.) While in such

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cases the public have a general right of way, the purchasers have a special right of way, as appurtenant to the lots thus purchased by them, which is a private interest vested in them, and of which they cannot be divested any more than of any other property. (*Matter of Seventeenth Street*, 1 Wend. 271; *Livingston v. The Mayor of New York*, 8 Id. 85; *Wyman v. The Mayor of New York*, 11 Id. 486; *Parker v. Framingham*, 8 Metcalf, 267; *Parker v. Smith*, 17 Mass. 415; *Alden v. Murdock*, 13 Id. 259.)

In *Bond v. Cunningham* (2 Cal. 368) it was held as an established principle, "that where lots are sold as fronting on, or bounded by, a certain space designated in the conveyance as a street, the use of such space as a street passes as appurtenant to the grant, and vests in the grantee, in common with the public, the right of way over such street; that such acts on the part of the grantor constitute a dedication of such street, and that he cannot afterwards so sell or dispose of it as to alter or defeat such a dedication." So it was held in *San Francisco v. Scott* (4 Cal. 114), that land may be dedicated to the public use as a street or highway, by deed or other overt act, or may be presumed from the lapse of time or acquiescence of the party. Again, in *Harding v. Jasper* (14 Cal. 642), it was held, that a dedication of a public highway might "be made either with or without writing, by any act of the owner, such as throwing open his land to public travel, or platting it and selling lots bounded by streets designated in the plat, thereby indicating a clear intention to dedicate."

We think it clear, then, upon principle and authority, that the deeds to the city, as well as the mortgage to the plaintiff's testators were a dedication of these streets to public use, and vested a right of way in the plaintiff's testators, unless controlled by the homestead right set up by the defendants. In this case, the description of the lot in the mortgage is "one hundred and twenty-two feet and six inches to Belle Air Street," and the same distance "to Pfeiffer Street;" and as the distance named only carries the line to the *sides* of those streets, it is insisted that the fee did not pass to the *center* of the streets. It is a settled principle of law that where a line is described as running to a certain object, and the distance is also given, it will go to the point named, though the real distance

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be greater or less than that specified, as a fixed object will always control distance in the description of lands. (*Colton v. Seavey*, 22 Cal. 497.) Here the description is to certain streets, and this would carry the line to the center of the street, if there was nothing further in the description to control or limit the lines. Whether the specification of the length of the lines will have the effect of limiting them to the sides instead of the center, is unnecessary to determine, because the plaintiff has a right of action, whether he is vested with the fee or only a right of way. Either gives him the right to prevent the defendants from obstructing the streets, and thereby injuring or destroying his vested right of passage. But the reason and authorities are very strong in favor of the doctrine that the conveyance passes the fee to the center of the street, subject to the public easement. (1 *Smith's Leading Cases*, 188, 189.)

The next question is how the claim of homestead affects this right. It is unnecessary to determine whether or not her signature was necessary to the deeds made by Folsom and Pfeiffer to the city, for the right of way claimed by the plaintiff does not depend upon those deeds, but upon the mortgage and the conveyance under it. The mortgage was duly executed and acknowledged by the wife, and she and her husband were parties to the suit for its foreclosure. The homestead claim, so far as it relates to the property covered by the mortgage, is barred by the decree of foreclosure and the sale and deed under it. This right of way passed to the purchasers as one of the appurtenances of the lot, and is therefore equally free of the claim of homestead. The deeds of Folsom and Pfeiffer can properly be referred to, to show the width of these streets, if for no other purpose. As these deeds to the city did not pass the *title* to the soil, but only operated as a dedication of public right of way over it, it may be doubtful whether they can be considered as a "sale or alienation," within the meaning of those terms in the homestead law. The plaintiff has a clear right to the remedy by injunction to stay the threatened injury to his right of way. (*Pract. Act*, Sec. 249.) It is the only remedy adequate to his case by which a continued injury like this can be prevented. (*Tuolumne Water Co. v. Chapman*, 8 Cal. 892; *Buckalew v. Estell*, 5 Id. 108; *Ramsey v. Chandler*, 3 Id. 90.) From the

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pleadings and findings the plaintiff is entitled to the relief prayed for in his complaint.

The judgment is reversed, and the Court below is directed to enter a decree according to this opinion.

WEIL v. PAUL *et al.*

AN instruction which embraces a statement that a witness has testified to certain facts should be refused.

S., a clothing merchant whose goods were under attachment, sold them to W., who procured the release of the attachment, and removed the stock to his, W.'s, cigar store. Within less than two weeks thereafter, S. was engaged professedly as employé of W. in peddling out the goods and managing their sale at retail, in which condition they were again attached as the property of S. : *held*, that there was no such actual and continued change of possession as was required by the fifteenth section of the Statute of Frauds, and that the goods were therefore liable to the attachment.

Where the vendor of goods is not at the time in possession, the transfer is an "assignment" within the meaning of that term in the fifteenth section of the Statute of Frauds, and an actual and continued change of possession is required equally as in case of a sale by one in possession.

APPEAL from the Sixteenth Judicial District.

One Strauss, engaged in the dry goods and clothing business, had his stock of goods attached at the suit of his creditor, and to obtain a release of the attachment sold the stock to the plaintiff, Weil, a cigar merchant, who paid or undertook to pay the attachment debt. Within a day or two after the sale, plaintiff received the goods from the Sheriff and removed them to his cigar store, where they were placed, some in boxes under the counter and some in a back room. A few days after, Strauss, under an alleged contract with Weil that the latter should pay him for his services seventy-five dollars per month, went to plaintiff's store and commenced selling the goods and peddling them out at retail. The management of the sales was left entirely with him, and at times while Weil was absent at San Francisco, Strauss had possession and control of the entire store and business. In this condition the goods were, under another attachment against Strauss, taken into

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possession by the defendant, the Sheriff of the county, as the property of Strauss. The action is by Weil for damages for this taking. A jury trial was had, resulting in a verdict in favor of plaintiff for seven hundred and thirty-three dollars, and judgment rendered accordingly. A motion for new trial was denied, and from this order and the judgment the defendants appeal.

H. O. Beatty, for Appellant.

Tod Robinson and *W. L. Dudley*, for Respondent.

CROCKER, J. delivered the opinion of the Court—COPE, C. J. and NORTON, J. concurring.

This is an action against the Sheriff and his sureties on his official bond to recover the value of certain personal property, consisting of dry goods and clothing, which had been taken by Paul, as Sheriff of Calaveras County, under an attachment against one Strauss, from whom the plaintiff had purchased them. It seems that the Sheriff had previously levied upon the same property, under a prior attachment against Strauss, and that while the goods were thus in his possession Strauss sold them to Weil for the purpose of paying off the attachment, and the Sheriff, after the payment of the debt, released the attachment, and Weil took possession, put them away in his cigar and tobacco store, and employed Strauss to sell and peddle them out for him. While they were in this situation another attachment against Strauss was levied on the goods, and Weil brings this suit to recover their value. He recovered judgment in the Court below, and the defendants appeal.

The only statement on appeal in this case is a stipulation, signed by the attorneys of both parties, agreeing that the judgment roll, orders, and instructions given, and refused by the Court, the statement on motion for a new trial, and the stipulation thus signed, "is a true and correct statement on appeal to the Supreme Court, and may be used as such without further certificate or identification." None of these papers contain the grounds of appeal required by Sec. 338 of the Practice Act, the construction of which was settled by this Court in the case of *Barrett v. Tewksbury* (15 Cal. 354),

and the respondent now objects that for this reason the statement forms no part of the record, and must therefore be entirely disregarded. We think, however, the agreement of the parties amounts to a waiver of this objection. It would be an injustice to the appellant, if after entering into an agreement of this kind the respondent should be permitted to make such an objection in this Court for the first time.

On the trial the defendants asked the Court to give the following instruction, which was refused, and which they now assign for error: "If the jury believe the evidence of A. Strauss, the plaintiff's witness, that he had the possession of the goods in controversy after the sale to the plaintiff, and was selling and peddling them out, they will find a verdict for defendants." There was no error in refusing to give the instruction in this form, as it included a statement by the Court that the witness had testified to certain facts, and the jury are the proper judges of what a witness has testified to.

It is also insisted that the Court erred in giving the second, third, and fourth instructions asked for by the plaintiff, which are as follows :

"2. A change and continuation of possession of personal property in law is where the vendor loses the actual possession or control of the thing by him sold, and the vendee takes possession and holds the same, and in this case the removal of the goods from Strauss' store to the store of the plaintiff was in law a delivery, and an actual change of possession, and the fact that the vendor, Strauss, after such removal and change of possession was employed by the vendee, and while in his employ sold or peddled some of the goods, does not of itself prove want of continuation of the possession of the vendee.

3. The fact that Strauss sold a portion of the goods after his sale and delivery to the plaintiff, and while in plaintiff's employment, does not of itself constitute a possession in Strauss, such as is contemplated by Sec. 15 of the Statute of Fraudulent Contracts, etc.

4. In sales of personal property all the statute requires is that delivery must be made ; that the vendee must take actual posses-

sion ; such possession must be open and unequivocal, carrying with it the usual marks and indications of ownership by the vendee ; the possession must be continuous—not taken to be surrendered back again—not formal, but substantial ; but it need not necessarily continue indefinitely when it is *bona fide* and openly taken and is kept for such a length of time as to give a general advertisement of the standing of the property and the claim to it by the vendee ; and in this case, if the jury find from the evidence that these requirements were substantially followed and there was no fraud in fact, the sale is valid and the plaintiff is entitled to recover.”

The defendants claim that although there may have been an actual delivery of the goods at the time of the sale to Weil, yet that the evidence shows that there was not “an actual and continued change of possession,” within the requirements of the fifteenth section of the Statute of Frauds ; that the employment of the vendor to sell the goods, and his actually engaging in the business of selling and peddling them out, within a few weeks after the sale, was the exercise of acts of possession and ownership by the vendor which vitiated the sale. We think that the fact that Strauss soon after the removal and change of possession was employed by the vendee, and while in his employ sold and peddled some of the goods, proves a want of continuation of the possession in the vendee, and the fact that Strauss sold some of the goods after his sale to the plaintiff and while in his employ, did constitute a possession in Strauss, and that the Court erred in instructing the jury to the contrary.

It would be impossible to lay down a fixed rule, applicable to all cases, establishing the length of time a vendee of personal property should continue in the exclusive possession to vest a title beyond the reach of this section of the Statute of Frauds. Each case must necessarily be governed and determined by its own peculiar circumstances. It is clear, however, that the exclusive possession by the vendee for only a few weeks, under the circumstances of this case, and the employing of the vendor to sell and peddle them out, the vendee being engaged in the sale of an entirely different kind of goods, did not constitute such “an actual and continued change of possession” as is required by the statute. Where the facts are

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undisputed, as in this case, it is the duty of the Court to determine, as a question of law, whether such facts constitute an "actual and continued change of possession," within the statute.

The judgment is reversed, and the cause remanded for further proceedings.

On petition for rehearing, CROCKER, J. delivered the following opinion—COPE, C. J. concurring:

In the petition for a rehearing it is urged that Sec. 15 of the Act respecting fraudulent conveyances and contracts applies only to sales of goods in the possession of the vendor, and that, as the goods in this case were in the possession of the Sheriff at the time of the transfer from Strauss to the plaintiff, therefore the statute does not apply, and it was not necessary for the plaintiff to maintain an "actual and continued change of possession." It will be noticed, however, that Sec. 15 includes "sales" and "assignments" of goods and chattels—that is, sales made by a vendor of goods in his possession or under his control, and assignments of goods not thus in his possession or control. If the goods were not in Strauss' possession or under his control at the time of his contract with the plaintiff, then the transfer to the plaintiff was an assignment of the goods or the right to their possession, and it comes fully within the statute.

Rehearing denied.

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- A DEED executed by only a part of the persons named in the body as grantors is good as to the executing parties, and conveys their interest in the property.
- An acknowledgment of a conveyance taken and certified to by a Justice of the Peace within his county is valid, without regard to the locality of the land conveyed, and though it is situated in another county.
- In the description of a deed one line was described to run "thence *westerly*, including the cañadas, to a stake, so that a line running from thence to the Dos Pedros will pass about two hundred yards from the present new corral of the said José Jesus Lopez:" *held*, that the line was to be located by the natural landmarks mentioned, although these determined its course to be north-easterly, instead of westerly.

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- A description of a line in a deed by natural or artificial landmarks clearly identified, will govern and control one by course or distance where they do not agree.
- Parol evidence is admissible to explain the location of the objects mentioned in the description of a deed, and thus fix the boundary lines of the tract conveyed.
- A subsequent purchaser who seeks to avoid a prior deed of the same premises made by his grantor on the ground that he is a purchaser in good faith and without notice, must show affirmatively that he paid a good and valuable consideration.
- An acknowledgment of the payment of the purchase money by the grantor in a subsequent deed is no evidence of the fact of payment as against one claiming under a prior deed.

APPEAL from the Seventh Judicial District.

The facts are stated in the opinion of the Court.

Wm. H. Jones, for Appellant.

I. The deed under which plaintiff claims conveyed no title, and is inoperative and void against the defendant.

1st. It was not shown by the plaintiff that the grantors named in the deed had such an estate as would enable them to join in a conveyance of all the premises therein described. (3 Phil. Ev. 580, 4th Ed.; *Doe v. Butler*, 3 Wend. 149; 1 Starkie's Ev. Part 11, Sec. 135.)

2d. This is a joint deed, and in a joint demise the title must be joint. (*Taylor v. Taylor*, 3 Marsh. 19; *Tucker v. Vance*, 2 Id. 458; *Jackson v. Bradt*, 2 Caine's, 174.)

3d. It is an unexecuted instrument. Only five out of the thirteen whose names appear in the body of the deed ever signed it, or admitted they had done so. In a joint instrument, all that are named as parties to it in the instrument should execute it. It must be the act of all and of each of them, otherwise the instrument will be inoperative and void. This is the rule as to bonds and commercial paper. (*Wood v. Washburn*, 2 Pick. 24; *Sharp v. United States*, 4 Watts, 21; *Bean v. Parker*, 17 Mass. 591; *Johnson v. Easkino*, 9 Texas, 1; *Fletcher v. Austin*, 11 Vt. 447; *Conrad v. The Atlantic Ins. Co.*, 1 Pet. 388, 451; *Hawkins v. Kemp*, 3 East. 440.) And the same rule applies to deeds. The execution

must be proved by all the parties. (11 Phillips' Evidence, 459, 4th Ed.)

II. This deed was not entitled to record in the County of Marin, and the defendant had no notice of it when he purchased the premises in controversy in 1858. The land described in the deed was situated in the County of Marin. M. D. Lewis was a Justice of the Peace for Sonoma County, and had no authority to take acknowledgments of conveyances of land not within his county. The clause, "Justices of the Peace within their respective counties" (Sec. 135, Art. 5, p. 30, Laws of Cal. 1851), means Justices of the Peace within and for the county where the land lies. The record of the deed in Marin County did not therefore impart notice. (1 Story's Eq. Sec. 404.)

Neither the plaintiff nor any of the persons through whom he claims have been in possession of the land described in this deed or of the land described in the complaint since the date of the deed (June 26th, 1862). The land in controversy is not embraced within the lines described in this deed. And if actual notice of the contents of the deed had been proven by the plaintiff, still the courses given in the deed cannot be interpreted reversely for the purpose of connecting such notice with the land in controversy. The plaintiff therefore failed to prove a title upon which he could recover. (*Estrada v. Murphy*, 19 Cal. 248.) And a failure to prove notice was a failure to prove a right of entry. (*Ortman v. Dixon*, 13 Cal. 37.)

III. The admission by the Court of the testimony of J. H. Lewis and J. A. Tustin was error. Title to land or disclaimance of title does not rest in parol declarations. (*Williams v. Miller*, 6 Cow. 751; *Van Allen v. Vasburg*, 7 Johns. 186; *Livingston v. Resselbach*, 10 Id. 336, 338; *White v. Cary*, 16 Id. 302.)

IV. The defendant has a legal title to the premises, and the legal title must prevail in this action. The defendant's deed can be set aside only on the ground of fraud; and the fact that it was fraudulent must be found. (Wood's Dig. 105, Art. 389, Sec. 1; *Gillan v. Metcalf*, 7 Cal. 138; *Swartz v. Hazlett*, 8 Id. 127, 128; *Little v. Harvey*, 9 Wend. 158.) There is no such fact found. The recital in a deed showing payment of the considera-

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tion is *prima facie* proof of the fact. (*White v. Miller*, 22 Vt. 380; *Glen v. Grover*, 3 Md. 212; *Jackson v. McChesney*, 7 Cow. 360; *Ayres v. McConnell*, 15 Ill. 230.) Though not conclusive so as to shut out proof of fraud. (*Evans v. Edmonds*, 24 Eng. Law and Eq. 227; *Spear v. Ward*, 20 Cal. 676.) Fraud must be proved (1 Story Eq. Sec. 190), and the want of a valuable consideration is not evidence of fraud. (Wood's Dig. 105, Art. 389, Secs. 1 and 107; Art. 411, Sec. 23; *Gillan v. Metcalf*, 7 Cal. 138, 139; *Swartz v. Hazlett*, 8 Id. 127, 128.)

There can be no fraud where there is no notice. (Wood's Dig. 107, Art. 412, Sec. 24; *Wyatt v. Barwell*, 19 Vesey, 437; *Joland v. Stainbridge*, 3 Id. 485; *Dey v. Dunham*, 2 Johns. Ch. 182, 190, 191; *Berry v. Mutual Ins. Co.*, Id. 603; *Buckingham v. Frost*, 18 Johns. 562; *Jackson v. McChesney*, 7 Cow. 360; *Dennis v. Burritt*, 6 Cal. 673.) And there can be no notice where there is no title. (*Smith v. Brannan*, 13 Cal. 107.)

V. Should the Court reach the conclusion that the deed, Ex. No. 58, D. O. S., did operate to pass a title, still the plaintiff cannot recover, because the deed conveys a specific parcel of a common estate, and the tenants did not all join in the execution of it, and the defendant is seized as tenant in common of an estate in the whole ranch. (*Stark v. Barrett*, 15 Cal. 368; *Touchar d v. Crow*, 20 Id. 162.) There is no proof of actual ouster of the plaintiff by defendant.

F. D. Colton, for Respondent.

I. The deed under which we claim is a warranty deed, and it does not matter whether the other persons executed it or not. A conveyance from several persons is the separate conveyance of each. It is not like a note or bond where each is bound for the whole amount. A conveyance of land by several persons conveys the title of all who execute and deliver it. (4 Pet. Abr. 612; *Jackson v. Stanford*, 19 Geo. 14; *Scott v. Whipple*, 5 Greenl. 336.)

II. Appellant claims as a subsequent purchaser, and in order to postpone the prior deed he must show that he is a *bona fide* purchaser for a valuable consideration. (Wood's Dig. 103, Art. 363.) No proof was made of any consideration paid. The recital in his

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deed is no evidence of the payment of a consideration in this case. It is simply an admission made by a party after he had parted with his interest in the land, and could not affect a prior purchaser. (*Nolen v. Gwyn*, 16 Ala. 725; 5 Phillip's Ev. Cowen & Hill's Notes, 453, 454, note 251; *Penrose v. Griffith*, 4 Bin. 231; *Garwood v. Dennis*, Id. 332; *Widman v. Kohr*, 4 Serg. & R. 174.)

III. Appellant claims that the deed to Barbara Ann Lewis is void on account of an error in the second course in the description of the land. The line is run "westerly" when it should be "northeasterly." The boundaries named in the deed are all well known, well defined points, and conspicuous objects. Monuments control courses and distances. (*Stanley v. Green*, 12 Cal. 163; *Verguhart v. Barleson*, 6 Texas, 511; *Berry v. Wright*, 14 Id. 270; *Brown et al. v. Huger*, 21 How. 818; *Lamb v. Buchmiller*, 17 N. Y. 623; *Sawyer v. Kendall*, 10 Cushing, 246.)

CROCKER, J. delivered the opinion of the Court—NORTON, J. concurring.

This is an action to recover the possession of a tract of land—part of the Rancho Laguna de San Antonio—in Sonoma County. The case was tried by the Court, who found for the plaintiff, and judgment was rendered accordingly; from which, and from an order denying a new trial, the defendant appeals.

Both parties claim title under Bartolome Bojorques. It appears that on the twentieth day of November, 1851, he executed to José Geraldo Bojorques, and seven others, a deed for the eight-ninths of said rancho. On the twenty-sixth day of June, 1852, José Geraldo Bojorques, Bartolome Bojorques, and the other grantees in the former deed, with their wives, executed a deed to Barbara Ann Lewis for a part of the rancho, including the premises in controversy, and the plaintiff claims his title under this deed. On the seventh day of January, 1857, Bartolome Bojorques executed a deed to José Geraldo Bojorques for the undivided one-ninth of the above named rancho; and on the same day the latter and his wife conveyed to Hamilton Gaston and eleven others the undivided one-ninth of said rancho, with this exception, "saving and excepting from this sale eight hundred and seventeen acres heretofore conveyed

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by the said parties of the first part." The defendant claims his title under one of the parties to this deed.

The defendant contends that the deed to Barbara Ann Lewis, under which the plaintiff claims, conveyed no title, and is inoperative and void against the defendant. It is objected that the evidence does not prove that more than five of the grantors executed it, and that unless all executed it, it is inoperative and void. Several cases are cited relating to the execution of bonds by several parties, but such cases have no application to conveyances. Even if the evidence had shown that this deed was executed by only a few and not all of the grantors named in it, we think it clear that it would be good as to those who did execute and deliver it, and sufficient to convey their interest in the property. (*Scott v. Whipple*, 5 Greenl. 336; *Jackson v. Stanford*, 19 Geo. 14.) It appears to have been properly acknowledged by all the grantors, before a Justice of the Peace, and the signatures of all, by their marks, appear to the deed, which shows that it was duly executed by all of them.

It is, however, objected that the land described in the deed then lay in Marin County; that this acknowledgment was taken by a Justice of the Peace of Sonoma County, and therefore it affords no proof of the execution of the deed, and does not authenticate it so as to authorize its registry in Marin County. The one hundred and thirty-fifth section of the Act of 1851, respecting Courts of Justice (Stat. 1851, 29, 30), provides that the Judges of the Supreme and certain other Courts "shall have power in any part of the State, and Justices of the Peace within their respective counties," to take and certify "the proof and acknowledgment of a conveyance of real property, or of any other written instrument." It is contended that under this provision a Justice of the Peace could only take an acknowledgment of a conveyance of real property situated in the county where he held his office. In this the appellant is mistaken. We think the intention of the Legislature is clearly expressed, that a Justice of the Peace might take the acknowledgment and make his certificate thereof anywhere within the county where he held his office, without regard to the locality of the land conveyed, but that he could not, like the Judges of the other Courts, take and certify

such acknowledgments in other parts of the State outside of his own county.

In the deed to Barbara Ann Lewis, the first and second lines of the tract conveyed are described as follows: "Beginning at a stake near the old corral of José Jesus Lopez, running thence easterly to the head of the cañada, thence *westerly*, including the cañadas, to a stake, so that a line running from thence to the Dos Pedros will pass about two hundred yards from the present new corral of the said José Jesus Lopez," etc. It seems that this second line, instead of being in a *westerly* course, is, in fact, about north-east, as shown by the natural landmarks stated in the deed, and that if this line was run a west course it would not include the premises in controversy. The appellant contends that the description by course must govern. It is clearly established that "when a deed of land describes the subject matter by monuments clearly identified, such as a river, a spring, a stream, a mountain, a marked tree, or other natural object, and courses, distances, and quantity are likewise inserted, which disagree with the monuments, the description by monuments shall in general prevail; for it is more likely that a person purchasing or selling land should make mistakes in respect to course, distance, and quantity than in respect to visible objects, which latter, from being mentioned in the deed, are presumed to have been examined at the time." (2 Phillips' Ev. C. H. and E.'s Notes, 783, note 520: citing numerous cases.) This rule applies to all objects visible, fixed, and clearly ascertained, such as the lands of other individuals or their corners, clearings, a stake, post, or stone, or a road. (Id.) So lines, corners, and stations actually run and marked will prevail over courses and distances. (2 Hill. on Real Prop. 254; 2 Greenleaf's Cruise, 338.) The evidence shows that the objects called for in the description of this second line are sufficient to control the course stated therein, and it should be construed accordingly.

The testimony of the witnesses Martin, Lewis, and Tustin, in explanation of the location of the objects set forth in the description of the several lines in this deed, was properly admitted.

The deed under which the plaintiff claims, having been executed prior to the one from the common grantor under which the defend-

ant claims, it is urged that this prior deed cannot be attacked by the defendant without showing that he and those under whom he claims were *bona fide* purchasers, without notice, for a good and valuable consideration actually paid; and the defendant insists that the acknowledgment of the receipt of the purchase money in the deed, which is in the usual form, is sufficient evidence of the payment of such consideration. It is true that in some cases, between a certain class of parties, the ordinary acknowledgment in a deed of the receipt of the purchase money, is *prima facie* evidence of payment. But this rule does not apply to a case like the present. The plaintiff claims under a deed executed by Bartolome, José Geraldo Bojorques, and others, dated June 26th, 1852; Bartolome afterwards, on the seventh day of January, 1857, conveys the one-ninth of the ranch to José Geraldo, who, on the same day, makes a conveyance under which the defendant claims. Admitting that these latter deeds include the premises conveyed by the first, it follows that at the date of these last deeds neither Bartolome nor José Geraldo had any title which they could convey in the land described in the first deed. But if the defendant or his grantor purchased the property in good faith, without either actual or constructive notice of the prior deed, and for a good and valuable consideration actually paid, then in equity he has the better right. But he has no right to claim as against this prior deed until he proves those facts. The acknowledgment of the payment of the purchase money by the grantors in these subsequent deeds is no evidence of the fact as against those holding under the prior deed, because it is a mere declaration or admission made by the grantors after they had conveyed the property; and it is a rule of law well settled that such admissions or declarations are not admissible as evidence to defeat the rights of their vendee acquired under their prior deed. A contrary rule would enable a vendor or assignor to defeat the title of his own purchaser after he had parted with all his interest, which would enable them to perpetrate a fraud. (*Nolen v. Gwyn's Heirs*, 16 Ala. 725; *McGinty v. Reese*, 10 Id. 137; *Willard's Equity*, 256.) We are aware that there are some decisions which conflict with this view, but we are satisfied that the rule as thus laid down is correct upon principle. The deed from José Geraldo Bojorques,

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under which the defendant claims, contains an exception which it would seem was intended to apply to the land the grantor had previously conveyed by the deed under which the plaintiff claims; at least no other deed was shown to which it could properly apply. If that was not the tract excepted, the defendant should have shown by proper evidence what tract it did apply to. It follows, therefore, that the tract described in the deed of June 26th, 1852, was not in fact conveyed by the subsequent deed made in 1857, but was excepted out. This deed of June 26th, 1852, appears to have been executed by all the owners, who were tenants in common, of the entire estate. The title of the plaintiff is not, therefore, an undivided interest or a tenancy in common. But even if it was, the defendant, as we have shown, acquired no title under his deed, and he was not therefore a tenant in common with the plaintiff, and it was not necessary to prove an actual ouster by the defendant.

We have carefully examined all the material questions raised by the appellant, and find no valid ground for disturbing the judgment, and it is therefore affirmed.

BORLAND v. O'NEAL.

AN execution debtor who has more horses than the number exempt by law may elect which he claims as exempt, but such election must be made and the officer notified thereof either at the time of the levy or within a reasonable time thereafter or the right to elect will be deemed waived.

Where two of several horses owned by an execution debtor were levied upon and no notice of claim of exemption was given to the officer until the day of sale, which was four months after the levy: *held*, that the right of election had been lost by the unreasonable delay in exercising it, and that the officer was justified in selling the property.

In determining whether notice of claim of exemption of property levied upon was given by the debtor within a reasonable time, the fact that the plaintiff had at the time of the levy other property of a similar character out of which the debt might have been made is proper matter of proof.

The exemption of property from sale on execution is a personal right which the debtor may waive or claim at his election.

APPEAL from the Fifth Judicial District.

The facts are stated in the opinion.

W. R. Cantwell, for Appellant.

I. The horses in question were exempt from forced sale. The statute entitled the plaintiff to two horses, without any limitation as to their character or value. This proposition is not affected by the fact that the horses were stallions or racers. (*Prac. Act*, Sec. 219; *Springer v. Harris*, 22 Penn., 10 Harris, 191; *Allman v. Gann*, 29 Ala. 240.)

II. The appellant had a right to make his selection of such two horses at any time before their actual sale under the execution, and such selection was rightly made by parol request of the Sheriff. A mere demand of the benefit of exemption law is sufficient. (*Bowman v. Smalley*, 31 Penn. State, 225.) And exemption laws are to be liberally construed. (*Gillman v. Williams*, 7 Wis. 329.) In fact it was not necessary for the appellant to have made any designation of the property specifically exempted. It was for the Sheriff to know the statute and obey it at his peril. (*Id.*) In Wisconsin it is even held that no agreement to forego the benefit of the exemption law can be valid; and this, though the execution does not in terms except property exempt by law. The officer is bound to know the law and obey it. (*Maxwell v. Reed*, 7 Wis. 582.)

III. The Court below erred in permitting the respondent to prove that the appellant at the time of the levy was the owner of other horses. His ownership of other horses did not affect his right to claim the exemption of the two involved in this suit. The instructions given and refused raise the same question and are in like manner objectionable.

IV. The appellant adopted the appropriate remedy. One whose property is exempted from seizure on execution, which property has been taken in satisfaction of the judgment against him, may maintain replevin for the specific goods. (*Mallory v. Norton*, 21 Barb., N. Y., 424.)

H. O. Beatty, for Respondent, cited *Robinson v. Meyers* (8 Dana, 441) and *McGee v. Anderson* (1 B. Monroe, 187).

CROCKER, J. delivered the opinion of the Court—COPE, C. J. concurring, and NORTON, J. concurring specially.

This is an action to recover the possession of two horses levied upon by the defendant, as the Sheriff of San Joaquin County, by virtue of an attachment against the plaintiff, who claims them as exempt from levy and sale. The defendant recovered judgment, from which the plaintiff appeals.

The record shows that on the ninth day of March, 1861, the defendant, as Sheriff, levied upon the horses in question, which are described as stallions and race horses, under and by virtue of an attachment against the plaintiff; that at the time the plaintiff resided in El Dorado County, where he had several work horses, which he sold and disposed of after the levy and before the commencement of this suit; that the plaintiff carried on the business of a butcher and farmer, raising and selling horses and cattle; that he had several horses, besides those in controversy, which he used in his farming business; that a judgment was rendered in the suit in which the attachment issued, on which an execution issued, and on the day of the sale of the property, which was about four months after the levy, the plaintiff appeared, and for the first time claimed them as exempt from execution, and demanded possession, which was refused, and the Sheriff sold the property under the writ.

The plaintiff was entitled to hold two horses exempt from execution, under the third clause of section two hundred and nineteen of the Practice Act. When the debtor has more horses than the number exempt by law, he has the right to elect which he claims as exempt, and such election must be made at the time of the levy, or within a reasonable time after notice of the levy, by giving the officer notice of such election. The officer is under no obligation to hunt up the debtor in advance of the levy, in order to procure a selection by him. (*Seaman v. Luce*, 23 Barb., S. C., 240; *Lockwood v. Younglove*, 27 Id. 506.) The debtor waives his right by failing to claim it; and a claim under one execution, when no sale was made under it, is not sufficient when the property was levied upon and sold under a subsequent execution. (*Dodson's Appeal*, 25 Penn. State, 232.) The exemption of property from sale on

execution is a personal right which the debtor may waive or claim at his election. (*State v. Meloque*, 9 Indiana, 196.) Where the debtor has several horses, and one is exempt from execution, he may elect which shall be exempt; but if he has some not in the jurisdiction of the officer, and so beyond the reach of the execution, and there is only one within the reach of the execution, he cannot defeat the creditor's levy on that one by electing to keep it. Such a course would be using the statute, which was intended for beneficent purposes, as a means of evasion and fraud. (*Robinson v. Meyers*, 3 Dana, 441.) And where the officer levied on one horse, leaving another in the possession of the debtor as exempt, and the latter on the day of sale claimed the horse levied on as exempt: *held*, that his proceeding to sell under the execution was not wrongful, unless the debtor should tender him for sale, in lieu of the article levied on, such other articles as he might in the first instance have seized for the satisfaction of the debt, or so much as was certainly and palpably sufficient to discharge the debt, or was at least equal in vendible value to the article claimed to be exempt. (*McGee v. Anderson*, 1 B. Munroe, 187.)

In the present case the appellant contends that the Court below erred in permitting the defendant to prove that, at the time of the levy, the plaintiff had other horses in El Dorado County which he could have claimed as exempt from levy and sale. The action of the Court in this respect was clearly correct. It was the duty of the plaintiff, within a reasonable time after notice of the levy, to assert his claim to have these particular horses exempt; and the delay in this case greatly exceeded a reasonable time, especially as he showed no excuse for the delay, or any good reason why it was not made before. The notice should be promptly given, in order that the officer may levy on other property, in the place of that selected, to secure the debt, if there is any. What will constitute a reasonable time will, therefore, depend upon the particular circumstances of each case. There may be cases where a notice of the selection given at any time before the sale would be sufficient, as where it appears that no injury has been caused by the delay. The fact that the plaintiff had plenty of other horses to answer the exemption, and the fact of the long delay in asserting

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the claim, were certainly strong if not conclusive evidence of a waiver of the right to select these particular horses as exempt.

The plaintiff asked the Court to give the following instruction, which was refused: "Such selection can be made at any time before sale by the Sheriff. But the Sheriff is liable only from the time he is notified of such selection and refuses to give up the property on demand." The Court gave the following instruction at the request of the defendant, to which the plaintiff excepted: "If at the time of the levy of the attachment plaintiff had other horses which he had usually used as farm or work horses, that he gave no notice that he claimed these horses for four months afterwards and until he had sold or disposed of such other horses, he cannot recover in this action, and they must find for the defendant." The appellant assigns the giving and refusing of these instructions as error. We see no just reason for disturbing the verdict on this ground. The instruction asked for by the plaintiff is not in accordance with the rules of law upon this subject, as has been already shown, and the instruction given is substantially correct.

Judgment affirmed.

NORTON, J.—It appearing that at the time of the levy the debtor had several other horses which he used in his farming business, the Sheriff was authorized to seize the horses in controversy. If the debtor had the right to select which he would retain, then within the authorities which concede to him such right he waived it by not making the selection at the time of the levy or within a reasonable time thereafter.

I agree in the conclusion of Justice Crocker that the judgment should be affirmed.

MOULIN v. COLUMBET.

THE presumption that the person enjoying the benefit of services rendered is bound to pay therefor what they are reasonably worth, may be rebutted by proof of a special agreement to pay a fixed amount, or in a particular manner, or by proof that the services were intended to be gratuitous.

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In an action for personal services, defendants asked an instruction to the effect that if the plaintiff served the defendant upon an understanding that he was to have only his living—board, washing, lodging, etc.—as a compensation, and that he had received these, then defendant should recover, which instruction the Court refused: *held*, that the instruction was proper, and that for the error in refusing it the judgment for plaintiff must be reversed.

APPEAL from the Fourth Judicial District.

The facts are stated in the opinion.

S. W. Holladay, for Appellant.

Geo. R. Parburt, for the Respondent.

CROCKER, J. delivered the opinion of the Court—COPE, C. J. and NORTON, J. concurring.

This is an action to recover for work, labor, and services performed by the plaintiff for the defendant. The defendant sets up as a counter claim an account for board, washing, etc., and further averred that the plaintiff was staying with him for his health, and all services rendered by him were in consideration of his board, lodging, and washing, and that his services were worth no more than that. The case was tried by a jury, who returned a verdict for the plaintiff for the sum of nine hundred and sixty-eight dollars and seventy-nine cents, and judgment was rendered accordingly, from which the defendant appeals.

On the trial, considerable testimony was introduced by the defendant showing that the plaintiff, during the time he claims pay for his services, was living in his family as a guest, rendering some service in return for the defendant's hospitality. No proof was offered of an express contract or agreement by the defendant to pay him for these services, but the plaintiff relied upon the presumption of law which arises from the proof of services rendered, that the person enjoying the benefit of the same is bound to pay what they are reasonably worth, the law implying a contract to that effect. Such undoubtedly is the general rule upon this question. It is founded, however, upon a mere presumption of law, and is liable to be rebutted by proof of a special agreement to pay therefor a particular amount or in a particular manner, or by proof that

the services were intended to be gratuitous, or even by particular circumstances, from which the law would raise the counter presumption, that the services were not intended to be a charge against the party who was benefited thereby.

Where services are rendered upon an understanding that the remuneration is to be at the entire discretion of the employer, no action is maintainable. (*Taylor v. Brewer*, 1 Maule & Selwyn, 290.) If services are rendered in expectation of a legacy, without any contract, no action can be maintained for them. (*Little v. Dawson*, 4 Dallas, 111; *Le Sage v. Cousmaker*, 1 Esp. 187; *Lee v. Lee*, 6 Gill & Johns. 316; *Patterson v. Patterson*, 13 J. R. 379.)

Where services were originally rendered gratuitously, they cannot afterwards be converted into a charge. A Court will not permit a friendly act, or such as was intended to be an act of kindness or benevolence to be afterwards converted into a pecuniary demand. (*James v. O'Driscoll*, 2 Bay, 101.) Where one works for another, the law in general implies a promise to pay what the work is worth, but that implication does not arise in favor of a son who continues with his father's family after he attains his majority, without agreement for wages; nor in favor of a man who marries a daughter, and lives with her in his father-in-law's family (*Lovet v. Price*, Wright, 89; *Defranca v. Austin*, 9 Barr. 309); or in favor of a daughter who thus remains with her parents or those who stand in place of her parents. As a general rule she would be considered as a visitor, not entitled to pay for her services, or liable to pay for her board. (*Andrus v. Foster*, 17 Vermont, 556; *Guild v. Guild*, 15 Pick. 129; *Fitch v. Peckham*, 16 Vermont, 150.) So a woman who has lived with a man as his wife, supposing herself to be such, cannot, on discovering that the marriage between them was void, recover for her services, upon an implied promise. (*Cropsey v. Sweeney*, 27 Barb. S. C. 310; *Swives v. Parsons*, 5 W. & S. 357.) When work is done by one for the benefit of another, with his knowledge or approbation, the law will imply a promise to pay for it, unless it appear that there was an understanding that no compensation should be given; but where there is such an understanding the law will not imply a promise, and such understanding

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may be implied from circumstances. (*Livingston v. Achiston*, 5 Cowen, 531.)

If it be true, as claimed by the appellant, that he received the plaintiff into his house and family when in bad health, and that the services rendered were intended as a return for the hospitalities he had received, and not as the foundation of a claim for compensation, it is clear that the plaintiff is not entitled to recover pay therefor, nor the defendant for his board and the accommodations he received. There was evidence tending to show that state of facts, and the defendant asked the Court to give the following instruction on that point: "That if the jury believe, from the evidence, that plaintiff went and continued with the defendant, induced so to do for his health, and to retire from the city; and, upon the understanding between them that the plaintiff was to have only his living with the defendant, such as board, lodging, washing, and the baths, for such services as he should render the defendant, then the verdict should be for the defendants." This instruction was a proper one, and should have been given by the Court, and it was clearly error to refuse it.

The judgment is reversed and the cause remanded for a new trial.

JOHNS v. TRICK.

In a proceeding by motion under Sec. 224 of the Practice Act to compel payment by a delinquent purchaser at judicial sale, the statement of the Sheriff upon which the motion is based need not state in terms that "loss was occasioned" by a failure to pay the amount bid. An averment of the amount of the bid and a re-sale at a specified smaller amount is sufficient.

APPEAL from the Fifteenth Judicial District.

The facts are stated in the opinion.

W. H. Rhodes, for Appellant.

J. Chadbourne, for Respondent.

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In order to authorize this proceeding, the motion or complaint must show an actual loss. The averment that a deficit was occasioned thereby is not sufficient. Trick may have bid a great deal more than the property was worth under a misapprehension of facts, and if the property was sold on the second sale for all that it was worth, then no loss was sustained by a judgment debtor or mortgagor.

The statute does not say if any deficit shall be occasioned thereby, as the Sheriff claims in this case, but says, "if any loss be occasioned thereby." This statute was evidently intended to meet cases where an actual loss should be occasioned by a second sale. Where the purchaser should bid less than the amount of the execution on a second sale, and the judgment debtor being insolvent, or having no other property to satisfy the demand of the plaintiff in execution, there would be a case contemplated by this statute. In such a case the plaintiff in execution would sustain a loss.

This is a statutory proceeding, special and summary in its character, and must be strictly complied with in order to acquire any right under it, and it must be strictly construed.

CROCKER, J. delivered the opinion of the Court—COPE, C. J. and NORTON, J. concurring.

This was a motion by the plaintiff, Sheriff of Tehama County, made on notice under Sec. 224 of the Practice Act, for a judgment against the defendant as a defaulting bidder at a Sheriff's sale of property on execution, issued on a judgment rendered in favor of the defendant against one Canble. The averments of the motion show that the property was first sold to the defendant for \$4,706; that he refused to pay the same on demand by the Sheriff; that the property sold on a re-sale for only \$2,787 54, leaving a deficit of \$1,918 46, which the Sheriff had demanded of the defendant, and which he refused to pay. The defendant demurred to the motion on the ground that it did not aver in specific terms that any "loss was occasioned thereby," in the language of the statute. The Court below sustained the demurrer, and rendered a final judgment for costs against the Sheriff, from which he appeals. The motion contains the substantial averments required in a case of this

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kind. It is not necessary to use the precise language of this statute. The facts stated show clearly a loss of \$1,918 46 in averring the amount bid at each sale, the difference between the two being a loss, because the bid at the last sale was much less than at the first sale. If the amount of the last sale had equaled or exceeded that of the first, it would have shown that there was no loss.

The judgment is reversed, the demurrer is overruled, and the defendant is required to file an answer to the motion within ten days after notice of the filing the *remittitur* in the Court below.

MOORE v. TICE *et al.*

In ejectment it is not necessary to a recovery by defendant that he show any title in himself. He may (except in the case of public lands where the rule is qualified) defeat the action by showing title and right of possession in a third person.

Under our Practice Act, if it appear that the plaintiff in ejectment had a right to recover at the commencement of the suit, but that his right has terminated during its pendency, he cannot recover the possession but only his damages.

A deed executed to the defendant in ejectment after the commencement of the action is admissible evidence for him.

Where the statement on appeal does not purport to contain all the evidence, the Appellate Court will not consider an objection that the verdict is not sustained by the evidence.

APPEAL from the Twelfth Judicial District.

The facts are stated in the opinion of the Court.

Waller & Moore, for Appellant.

I. The verdict is clearly against the evidence, and in such case a new trial will be awarded. (*People v. Martin*, 2 Cal. 484; *Bagley v. Eaton*, 8 Id. 164; *Potter v. Carney*, Id. 574, and the authorities cited in those decisions.)

II. The first and third deeds were executed since the commencement of this action. It needs no argument to prove that as plaintiff can only claim under such title as he held at the com-

mencement of the suit defendants can only set up a defense existing at the same date, and most especially if no later special defense is set up. (4 Cal. 70 ; Id. 279 ; 13 Id. 595 ; 16 Id. 89-92.)

III. Defendants cannot introduce outstanding titles of any kind under the answer. These titles were not set up as outstanding in the answer, nor are they set up in any way.

Porter & Sawyer, for Respondents.

I. The question whether the leases embraced the land in controversy was submitted to the jury, and even if there is some conflict of testimony this Court will not look into the evidence to decide questions of fact. (*White v. Todd's V. W. Co.*, 8 Cal. 444 ; *Weddle v. Stark*, 10 Id. 303 ; *Vischer v. Webster*, 13 Id. 60 ; *Sterns v. Irwin*, 15 Id. 504.)

The record does not purport to set out all the testimony, and only contains a meager statement, and this Court will not determine whether the verdict was contrary to the evidence or not. (*Samuels v. Gorham*, 5 Cal. 227 ; *Ford v. Holton*, Id. 327.)

II. The defendant being in possession of the premises in dispute, *prima facie* he is the owner ; and the deeds introduced on his part were merely cumulative evidence of his title and could not have affected the result of the action. A conveyance to defendant may be read in evidence though executed since issue joined. (*Carter's Lessees v. Parrott*, 1 Tenn. 237 ; *Adams on Ejectment*, 380.)

CROCKER, J. delivered the opinion of the Court—COPE, C. J. and NORTON, J. concurring.

This is an action to recover the possession of a tract of land in the City and County of San Francisco. The complaint avers that on the twenty-first day of March, 1860, the plaintiffs were the owners in fee simple and in possession of the premises described, and on the same day defendants wrongfully entered and ejected them therefrom, and ever since have detained the premises from them. One of the defendants, Henry J. Tice, answers, denying all the allegations of the complaint, averring that he is the owner as tenant in common with other parties. Henry M. Tice, by his answer,

denies the allegations of the complaint, and avers that he is the owner in fee simple of a portion of the tract, describing it, and disclaims all interest in the remainder. The jury found for the defendants, and a judgment was rendered accordingly. The plaintiffs moved for a new trial, which was denied, and they appeal to this Court.

The plaintiffs offered evidence tending to prove that Tice & Brother leased the premises in 1854, and also in 1856, of one Stuart, who, it is claimed, was a tenant in common with the plaintiffs at that time. It is insisted that this lease estops the defendants from denying the title of the plaintiffs. The complaint in this case charges the defendants not as tenants holding over after the expiration of a lease, but as trespassers entering without right; and it may well be questioned whether so great a departure in the proof from the allegations of the complaint is admissible. The allegations and proof should always correspond. The defendants, however, insist that these leases do not include the premises in controversy; and that seems to have been one of the questions passed upon by the jury. We are not disposed to disturb the verdict upon this point, for the evidence relating to it is very imperfectly set forth in the statement.

On the trial the defendants introduced several deeds, some of which bore date since the commencement of the action, and, among other grounds, the plaintiffs objected to their admission for that reason. The principle is well established that the plaintiff, in actions of this kind, when no tenancy exists, must recover on the strength of his own title, and he must show a clear and substantial title to the premises in question, or right of possession, to maintain the action. The defendant may confine himself to simply rebutting the evidence of the plaintiff. He need not show that he has any title whatever. It is sufficient if he makes it appear that the plaintiff has no title or interest entitling him to the possession at the time of the trial. He may show this by proving that the title and right of possession is in some third person, except in the case of public lands, in which case this rule is qualified. (Adams on Ejectment, 337-380, and notes; *Coryell v. Cain*, 16 Cal. 572.) The plaintiff must show a title or right of possession existing at the

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time of the commencement of the suit. (*Yount v. Howell*, 14 Cal. 465; *Stark v. Barrett*, 15 Id. 361.) But no necessity exists on the part of the defendant to show a title or right of possession existing in him at the time. He has a clear right to show by any proper evidence that at the time of the trial he has the title or right of possession, and this is sufficient to defeat the plaintiff's action. And if it appears that the plaintiff had a right to recover at the commencement of the suit, but that his right has terminated during its pendency, he cannot recover the possession, though he may recover damages for withholding the property. (Practice Act, Sec. 256.) The mere fact, therefore, that the deeds were dated since the commencement of the action was no valid objection to their admission. (*Carter's Lessee v. Parrott*, 1 Overton, Tenn., 237.)

It is also objected that the verdict is contrary to the evidence. The evidence set forth in the statement is very meager, and evidently very imperfect. It does not purport to contain all the testimony, and in such cases it is impossible for us to determine whether the verdict is sustained by the evidence or not. We cannot therefore disturb it.

Judgment affirmed.

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MONEY received by an administrator in payment for goods sold by his intestate as factor upon a *del credere* commission, forms no part of the assets of the estate, and may be recovered by the consignor in an action for money had and received.

Under our system of practice any pleading is sufficient in form which properly states the facts essential to a recovery.

A complaint in the old form for money had and received, is proper when a recovery is sought of money which defendant has received and refused to pay on demand to the plaintiff who is entitled to it.

APPEAL from the Fourth Judicial District.

The facts are stated in the opinion.

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J. D. Bristol, for Appellant.

I. Shaw, the intestate factor, would not have been liable to plaintiff in this form of action. (*Rolson v. Wilson*, 3 Mason, 240.)

II. The defendant, Sage, is not liable in this form of action, because Shaw would not have been liable, and plaintiff must come in with the other creditors of Shaw. (*Beach v. Forsyth*, 14 Barb. S. C. 502, 503; *Thompson v. Perkins*, 3 Mason, 240, and cases there cited.)

Shaw, the intestate, had a perfect right in his lifetime to receive and receipt for this money, and to sue for it, if necessary. (Story on Agency, Secs. 112, 400; *Robson v. Wilson*, 1 Marsh. Ins., B. 1, Ch. 8, Sec. 2, p. 295; cited also in *Thompson v. Perkins*, 3 Mason, 240; *Drinkwater v. Goodwin*, 1 Cowp. 255.)

If Shaw had collected and received this money in his lifetime, the plaintiff would have to come in with the general creditors of Shaw.

III. The defendant received the money as administrator, and treated it as assets of the estate, and this action can no more be brought against him than it could have been brought against Shaw if he had received it and then gone into insolvency. If plaintiff had brought suit against the purchasers of the goods for the price, the purchasers would have been entitled to set up any offset they had against Shaw's estate. (*Houghton et al. v. Matthews et al.*, 3 Bos. & Pul. 490.)

If defendant received the money, he did so by virtue of his authority as administrator of Shaw, and when so received the money became assets of the estate in his hands, because he has no authority to receive any property except the same be assets; and when so received, it must be disposed of according to the law regulating the estates of deceased persons.

W. W. Stow, for Respondent.

I. Plaintiff might have sued the purchaser of the goods from defendant intestate (Shaw). (*George v. Claggett*, 3 Ross' Leading Cases, 114, note to 115; *Id.* 127.)

II. The best attitude that defendant or his intestate can claim,

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is, that the intestate was a factor, with a *del credere* commission. (1 Bouvier's Law Dic. 392; 3 Ross' Leading Cases, 124, 126, 127-129.)

Note 2, Sec. 33, Story on Agency: "A factor with a *del credere* commission is liable to the principal if the buyer fails to pay, but he is not the principal debtor; on the contrary, the principal may sue the buyer in his own name, notwithstanding the *del credere*." (3 Mason, 232, 239; 1 Peere Williams, 314; 3 Id. 185; 7 Mass. 323; 1 Cow. 650, 664.)

III. The defendant as administrator has no right to the money. It is not assets. (8 Watts & Serg. 403, 404; *Beach v. Forsyth*, 14 Barb. 499.)

CROCKER, J. delivered the opinion of the Court—COPE, C. J. and NORTON, J. concurring.

This is an action to recover the sum of \$1,500, as money had and received by the defendant for the use of the plaintiff. The record shows that the plaintiff, who is a merchant in New York, consigned to one Shaw merchandise to be sold by him on commission *del credere*. Shaw received and sold the goods. He died; the defendant was appointed administrator of his estate, and collected the money from the purchasers, to the amount of \$1,500, knowing the facts. Plaintiff demanded the money of the defendant, and upon his refusal to pay brought this action and recovered judgment, from which the defendant appeals, contending that the money is part of the assets of the estate of Shaw, and that the plaintiff's only remedy is to file his claim as creditor of the estate and receive his dividends thereon.

It is clear that the money received by the defendant formed no part of the assets of the estate of Shaw. It was the property of the plaintiff, and he had a right to maintain an action to recover the same against the defendant. (*Merrick's Estate*, 8 Watts & Sergeant, 402; *Thompson v. Perkins*, 3 Mason, 232; *Kelly v. Munson*, 3 Mass. 319; *Beach v. Forsyth*, 14 Barb. S. C. 499.)

The appellant also contends that the action is not in proper form. Under our system of practice the rights of parties depend, not upon mere matters of form, but upon the merits of the case, as

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shown by the pleadings and evidence. The facts show that the defendant received the money of the plaintiff, that he has refused to pay it upon demand, and these facts are sufficient to sustain the action.

The judgment is affirmed.

COWELL v. WASHBURN.

THE purchaser of property in San Francisco at a sale for the taxes of 1858 is not entitled to an injunction restraining a sale of the same property for the unpaid taxes of 1857.

Under the Revenue Law of 1854, the lien of the State for State and county taxes attached on the first day of March of each year, and continued until the tax was paid. Neither a failure by the officer to include a delinquent tax of one year with the tax of the subsequent year, nor a sale of the property for the taxes of the succeeding year divested the lien for the prior tax.

APPEAL from the Twelfth Judicial District.

The complaint shows, 1st. That the plaintiff is the owner in fee and in possession of the premises. 2d. That the defendant is Tax Collector of the City and County of San Francisco. 3d. That defendant, as Tax Collector, threatens to sell said premises for the taxes levied and assessed thereon to John Cowell (who was the owner of the premises) for the fiscal year ending on the thirtieth day of June, 1857, under the Act of March 22d, 1859. 4th. That the same premises were sold in March, 1858, for the taxes assessed thereon for the fiscal year ending June 30th, 1858, to James Ross, who paid the amount then due for taxes and took his certificate of sale, and that the lien of the State was thereby transferred to him. That this certificate was assigned to the plaintiff, to whom a deed was duly executed on the eighteenth of September, 1858. 5th. That by the terms of the act under which defendant is threatening to sell, any deed which he may give is made *prima facie* evidence of title. 6th. That it will not appear from said deed that the same property had been previously sold for taxes of a subsequent year, and that the sale and deed of defendant will cast a

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cloud upon plaintiff's title. On this complaint, plaintiff applied for an injunction which was denied, and from this order he appeals.

John Reynolds, for Appellant.

I. The taxes of 1857 were necessarily and by operation of law included in taxes of 1858, and could not be separated. And the purchaser bought discharged of any previous lien of the State for taxes. (Statutes of 1854, 11, Sec. 96, Sub. 3. See also similar provisions in Statutes of 1857, 341, Sec. 46.) It is contended that the law does not provide that the taxes remaining delinquent shall become a part of the tax title for the next year, but that the officer shall add them, and that therefore the complaint should aver that they were so added. But what the law imposed upon the agents of the State, it is presumed was done. And then, again, the law only provides for and recognizes one lien for taxes as existing at the same time. And when the State sells and transfers her lien to a purchaser, she cannot withhold a part thereof and use it against the purchaser, any more than an individual could separate an entire lien and use a part of it against a purchaser to whom he had covenanted that he transferred to him all liens which he held. (Revenue Law of 1857, Secs. 32, 15, 20, 23; also, Statutes of 1854, 111, Sec. 96, Sub. 3.) These statutes enter into and form part of the contract of sale and purchase for taxes, and the State is bound to keep her covenants thus made. This was evidently the intention of the Legislature as appears from the last clause of Sec. 8, Laws of 1859, 125.

II. When a sale was made for the taxes of the fiscal year ending June 30th, 1858, the purchaser became invested with all the lien of the State, for taxes up to that time, or at least up to the end of the fiscal year for which the sale was made. And the purchaser took an absolute title free from any prior lien of the State for taxes. (Statutes of 1857, Secs. above referred to; *Id.* 334, Sec. 23.)

III. The deed of the defendant under the sale which he proposes to make, would cast a cloud upon plaintiff's title. (Statutes of 1859, 126, Sec. 11; *Palmer v. Boling*, 8 Cal. 388; *Fremont v. Boling*, 11 *Id.* 387; *Pizley v. Huggins*, 15 *Id.* 132.)

J. B. Felton, for Respondent.

CROCKER, J. delivered the opinion of the Court—COPE, C. J. and NORTON, J. concurring.

This is an appeal from an order refusing to grant an injunction to restrain the defendant, who is Tax Collector of the City of San Francisco, from selling the property described in the complaint for taxes. The application was made on the complaint alone. The sale sought to be enjoined is for taxes due for the fiscal year ending June 30th, 1857, and the plaintiff alleges that he has a deed, executed in pursuance of a sale for taxes upon the same property due for the fiscal year ending June 30th, 1858. There is no averment that the taxes for 1856-7 have ever been paid, but the plaintiff contends that by his purchase and deed under the sale for taxes due the subsequent year he took the title of the property free from all prior claims for taxes; that the taxes of 1857 were necessarily and by operation of law included in the taxes of the subsequent year, and could not be separated.

It seems that the Tax Collector in this case is proceeding to sell under the provisions of the Act of March 22d, 1859 (Stat. of 1859, 123), the first section of which legalizes the tax list of the City and County of San Francisco for the fiscal year ending June 30th, 1857, and the second and third sections legalize the list for 1858 and 1859. Sec. 9 authorizes the Tax Collector to collect by sale any tax assessed in any of the lists mentioned in Secs. 1, 2, and 3, and, with the subsequent sections, provides how, and in what manner, the proceedings shall be conducted for enforcing the collection. Sec. 96 of the Revenue Law of 1854 (Stat. 1854, 112), provides that after the final settlement on the first day of March, all delinquent taxes "shall be placed in the tax list of the succeeding year." So the Revenue Law of 1857 provides, by Sec. 46, that the delinquent taxes shall be added by the Clerk of the Board to the succeeding assessment roll. The complaint in this case does not show whether the delinquent taxes for 1857 were thus placed or added to the tax list of the succeeding year or not.

Sec. 99 of the Revenue Law of 1854, provides that the lien of

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the State for all taxes for State and county purposes shall attach on all real and personal estate on the first day of March, annually, "and such lien, to the absolute exclusion of all other liens, shall continue till all taxes thereon shall be paid," and it was under this law that the tax was assessed, to prevent the enforcement of which the injunction is asked. This section clearly established a tax lien upon the property, which continued until the taxes were paid, and the purchaser under a sale for taxes levied in a subsequent year, took his tax title subject to this prior lien for taxes. It is true, that these taxes, when delinquent, could and should have been put in with those of the succeeding year, and if again delinquent, the property could have been sold for the taxes of both years; but if the officer upon whom the duty was imposed of thus placing it in the list of the succeeding year neglected to do so, such neglect did not divest or destroy the lien established by the law. The law of 1859 clearly recognizes the separate existence of the taxes for each of the several years mentioned in Secs. 1, 2, and 3; but even if it had not, we do not conceive that it would make any difference.

The Court properly refused the injunction, and the order is therefore affirmed.

MELCHER v. KUHLAND.

A COMPLAINT, in an action to recover a debt from a married woman, which charges that she is a sole trader under the statute is sufficient, without any averment of facts showing that the debt was contracted in the particular business which she had declared her intention to carry on.

The fact that a married woman is a sole trader and contracts a debt, raises the presumption that the debt is contracted on account of her business as a sole trader.

APPEAL from the Fifth Judicial District.

The facts are stated in the opinion.

H. P. Barber, for Appellant.

In order to show a cause of action against a sole trader under

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our statute, the complaint must show that the indebtedness was contracted by her on account of the business which she carries on as a sole trader, and unless this is shown the record discloses no cause of action. A party relying on a statute must show a cause of action within its provisions. (*Dye v. Dye*, 11 Cal. 163; *Green v. Palmer*, 15 Id. 411, 415; 1 Chitty's Pl. 372, note 4; Id. 383; 3 Stew., Ala. 100; 1 Id. 51; 5 Metcalf, 298; 17 Cal. 119; 6 Ired. 352; 8 Foster, N. H. 520.) In *McKune v. McGarvey* (6 Cal. 497) this Court decided that "the effect of the statute was to make such married woman a *femme sole* as to the particular business or profession in which she was engaged."

L. Quint, for Respondent.

The effect of the statute as to sole traders is to make every married woman who avails herself of its provisions a *femme sole* with respect to all persons with whom she deals. She is not limited to any particular trade or occupation. (*Guttman v. Scannell*, 7 Cal. 458; *McKune v. McGarvey*, 6 Id. 498.)

A married woman a sole trader must sue and be sued in her own name, and all debts contracted by her while acting under the statute and availing herself of its provisions, are *prima facie* evidence of a legal debt that may be enforced by suit in the same manner and upon the same averments as respects the debt as against any other debtor. The case of *McKune v. McGarvey*, before cited, we insist fully sustains us in this view.

CROCKER, J. delivered the opinion of the Court—COPE, C. J. and NORTON, J. concurring.

This is an action upon two promissory notes executed by three persons, one of whom is averred to be a married woman, and another to be her husband. The wife is averred to be a sole trader under the statute authorizing married women to transact business in their own names, passed April 12th, 1852. She demurred to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action against her, and that it was uncertain and insufficient in not setting forth how she became a sole trader. The Court overruled the demurrer, the defendants filed a joint

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answer, the case was tried by a jury, who rendered a verdict for the plaintiff, and judgment was entered accordingly, from which the defendants appeal.

The only point assigned as error is the overruling of the demurrer, the appellant contending that the complaint should have averred the facts, showing that the debt was contracted by her on account of the trade or business specified in her declaration of intention to act as sole trader. We do not think such an averment necessary. The first section of the Sole Trader Act authorizes married women, who have complied with the regulations prescribed by the act, "to carry on and transact business *under their own name*." Sec. 3 provides that "said married women shall be allowed all the privileges and be liable to all the legal processes now or hereafter provided by law against debtors and creditors." The fact that she is a sole trader, and that she executed the note, is sufficient to raise the presumption, if any presumption is necessary, that the debt was contracted on account of her business as a sole trader.

The judgment is affirmed.

WYMAN v. BANVARD.

THE provisions of the amendatory School Land Act of April 22d, 1861, requiring that the proceeds of sales of the sixteenth and thirty-sixth sections shall constitute a State fund instead of being applied for the benefit of the townships in which the lands are situated, is constitutional and valid. It is not in violation of the grant made by Congress, nor, in requiring the interest upon previous sales made under the Act of 1858 to be transferred to the State fund, does it impair the obligation of a contract.

The School Land Act of 1858 is not a grant of the interest money to the several townships, but merely a provision as to the manner in which a certain fund shall be appropriated, and subject, therefore, to the future control of the Legislature.

APPEAL from the Eleventh Judicial District.

The complaint avers that under the Act of April 26th, 1858, providing for the sale of the State school lands, the sixteenth and thirty-sixth sections of certain townships of the surveyed public

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lands of Placer County were, on the eleventh day of January, 1860, sold—the purchasers giving the bonds for payment as required by the act; that the defendant is the Treasurer of Placer County, and has in his hands five hundred and fifty-six dollars of interest money paid upon said sales; that the townships are organized school districts in which public schools are maintained; that the plaintiff is the assignee of certain warrants drawn by the School Superintendent upon defendant for the said interest money, on account of services rendered in the public schools in said townships, and that defendant refuses to pay the warrants.

Defendant demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was overruled, and plaintiff had judgment, from which the defendant appeals.

A. S. Higgins, for Appellant.

I. The grant by the United States to the State of California, is not only a grant to the State, but it is specifically so, and not to any township, nor for the particular benefit of townships as such. The manner of its appropriation to the respective townships and school districts for the purposes of schools in each township is left to the State, and this State, as well as all others, has always by general laws determined the terms, conditions, and limitations under which the township appropriations shall be made, and townships as such cannot by any possibility secure any title to the lands, or to any of the proceeds from the sales of the same, except by State legislation—no grant having been made to them by the General Government.

II. The law of 1858, referred to by respondent, does not grant—nor does it attempt to grant—the lands or the proceeds thereof to particular townships as such; but upon the other hand it only assumes to direct that the fund shall be set aside as a school fund, and the interest thereof appropriated to the support of common schools in the township. It is not necessary that the “support” be given in the particular manner provided by the Act of 1858—it may as well be done in the manner provided by the Act of 1861; nor indeed could the Legislature, if they should so attempt, give

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by absolute grant the land and its proceeds to the particular township where it is situated, for such an act would be clearly in violation of the conditions of its trust. They can only appropriate the fund to the general school purposes of the State, and not to particular localities.

James Anderson, for Respondent.

I. The Act of the Legislature of California of April 22d, 1861 (Stat. 1861, 218), is violative of the trust created by the Act of Congress of March 3d, 1853. (Wood's Dig. 748, Secs. 6, 7.) The sixth section of this act provides "that all the public lands in the State of California, whether surveyed or unsurveyed, with the exceptions of Sections 16 and 36, which shall be and are hereby granted to the State for the purposes of public schools in each township." To make this language plain and ascertain from whence these Sections 16 and 36 are to come, we must fill up an ellipsis which occurs in this sentence of the grant. It will then read "all the public lands in the State of California, whether surveyed or unsurveyed, with the exception of Sections 16 and 36 (in each township), which shall be and are hereby granted to the State for the purposes of public schools in each township," etc. If anything is wanting to give further indication of the meaning of Congress as to the object of the grant it is found in Sec. 7, which, after stating that if in any of certain contingencies the sixteenth and thirty-sixth sections shall be preoccupied for private or public uses, other land shall be selected in lieu thereof, agreeable to the provisions of the Act of Congress of May 20th, 1826, entitled "An Act to appropriate Lands for the Support of Schools in certain Townships, and fractional Townships, not before provided for." The act thus referred to (4 U. S. Dig. at Large, 179) recites "that to make provision for the support of schools, in all townships or fractional townships for which no land has been heretofore appropriated for that use in those States in which Section No. 16, or other lands equivalent thereto, is by law directed to be reserved for the support of schools in each township, there shall be reserved and appropriated, for the use of schools, in each entire township or fractional township for which no land has been heretofore appropriated or granted for

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that purpose," etc. It also provides that when such lands are selected they "shall be held by the same tenure, and upon the same terms, for the support of the schools in such township as Section No. 16 is, or may be held, in the State where such township may be situated." As a further but negative indication of the restriction laid upon the legislative authority of the State over these sixteenth and thirty-sixth sections thus granted, the Act of 1853, in Sec. 12, granting seventy-two sections to the State of California "for the use of a seminary of learning," directs that said lands "are to be disposed of as the Legislature shall direct." This construction is sustained by the judicial construction in our sister States to similar grants made by Congress, and by the enabling acts of Congress upon the same subject.

In Missouri (U. S. Stat. at Large, vol. 3. p. 428, Sec. 6) the sixteenth section in each congressional township was "granted to the State for the use of the inhabitants of every township for the use of schools," etc. The Supreme Court of that State in *Maupin v. Parker* (3 Mo. 219 of republication and 310 of the original) decided that the State might authorize the inhabitants to sell the lands as it might an individual (married woman for instance), but "that it cannot direct the fund to any other use than that of schools, but through the legislative body it can make rules to direct in what manner the funds arising from such lands, whether by sale or lease, shall be applied, leaving to the inhabitants of the township always the choice of retaining the land or alienating it. * * But still the money arising from such sale is the property of all the inhabitants of the township, and cannot be by this law divested from the use directed by the Act of Congress." (*Payne and Reggin v. St. Louis*, 8 Mo. 640; 4 Ala. 622; 3 Scam. 585; 19 Ark. 308.)

II. The right acquired by said townships eleven and twelve under the Act of April 26th, 1858, became and is a fixed, determinate, vested right; and in so far as the Act of 1861 attempts to alter and annul that right, by diverting the moneys and interest thereon otherwise due to said townships, it is violative of the clause in the Federal Constitution, which prohibits a State from passing any "law impairing the obligation of contracts."

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The fifteenth section of that act provides that "all moneys arising from the sale of land under the provisions of this act, shall be set apart as a permanent school fund, and the interest thereof only appropriated for the support and maintenance of common schools in the township to which the land belonged, from the sale of which the money accrued."

The Act of 1861 repeals (in terms) the Act of 1858, and provides (Sec. 8) that all moneys derived as principal from the sale of the sixteenth and thirty-sixth sections, sold under the provisions of the law of 1858, be paid by the counties respectively into the General School Fund of the State, and that the accruing interest thereon be thereafter applied to the maintenance of common schools throughout the State.

Whether the equitable interest in these sections were, as contended for by respondent, in the said townships, or all right, title, and interest therein were unqualifiedly at the disposal of the Legislature, the legislation of 1858 in the matter was legitimate. The State thereby ceded to the said townships the said sections, and the proceeds of the interest on the principal to be drawn in a certain fixed mode, whenever the inhabitants of the said townships respectively should take the necessary steps to perfect the grant by such showing as to entitle them to sale, etc., of the land, the sale, payment of the interest, and keeping the school the proper length of time, etc.

The Act of 1858 became and is a grant to said townships, and Parsons (2 Parsons on Cont. 683 and note Z), in commenting upon the clause of the U. S. Constitution heretofore referred to, says: "It seems to be settled conclusively that a grant is a contract—executed, it is true, but still a contract, and that it comes within the scope of this provision; and, therefore, if there be a grant in itself valid, any law which is or permits a direct interference with the enjoyment of the thing granted, or a diminution of their value, or any deprivation of the things granted, or of the rights or interests belonging to them, by the grantor, impairs the obligation of the contract." Judge Kent lays down the rule, if anything, stronger than Parsons (1 Kent's Com. 414, margin). This doctrine was carried to the extent, in the great case of the *Dartmouth*

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College v. Woodward (4 Wheat. 518), of sustaining the inviolability of a grant, even against the change of sovereignty and the violence of revolution. The Act of 1861 does not only impair, when applied to the case at bar, the obligation of the contract, but it destroys it. It takes from said township eleven, three hundred and ninety-six dollars and scatters it broadcast over the State, dividing it *per capita* among the children of the entire State.

CROCKER, J. delivered the opinion of the Court—COPE, C. J. and NORTON, J. concurring.

The question involved in this case relates to the proper construction of the Act of Congress granting the sixteenth and thirty-sixth sections of the public lands to the State of California for school purposes, and the statutes of this State providing for the sale thereof, and the application of the proceeds of such sale. Sec. 6 of the Act of Congress of March 3d, 1853, providing for the survey of the public lands in this State, and for other purposes, provides that all the public lands in the State of California, whether surveyed or unsurveyed, "with the exception of sections sixteen and thirty-six, which shall be and are hereby granted to the State for the purposes of public schools in each township," and with other exceptions, shall be subject to the preëmption laws. The respondent contends that these sections are granted for the purpose of establishing and maintaining public schools in the township where such sections are located, and cannot be used in support of a system of schools common to the whole State. In this he is clearly mistaken. These terms employed in the Act of Congress are an absolute and unconditional grant of all the sections of the public lands in the State numbered sixteen and thirty-six, for a distinct and specified object and purpose, and that is for the purpose of establishing and maintaining "public schools in each township" in the State. Neither the lands nor the proceeds thereof can be used for any other purpose. But Congress did not attempt to impose any conditions or specify or define the mode or manner in which this purpose should be carried into effect. It left that whole subject to the discretion of the Legislature of the State. The grant is made and the purpose specified; that is all. If the Legislature saw fit

to provide that these lands should be sold, and the proceeds placed in one common school fund, the interest on which should be applied equally to the support of all the common schools in each township in the State, there is nothing in the terms of the grant prohibiting them from so doing, but on the contrary the words employed properly sustain that construction. The "public schools" spoken of are not those of the township in which the particular sections are located, but "each township;" that is, each township in the State. The intention of Congress evidently was, that these lands should not be employed to sustain schools in particular portions of the State, leaving other portions destitute of such aid, but should be used to sustain a general system of public schools common to the whole State, and extending to "each township" in the State.

In the earlier grants by Congress of the sixteenth section for school purposes, they were expressly limited to schools within the township in which the section was located. Before the adoption of our National Constitution, Congress, on the twentieth day of May, 1785, passed an ordinance for ascertaining the mode of disposing of lands in the western territory, on which our present land system is mainly founded. Among other provisions it contains the following: "There shall be reserved the lot No. 16 of every township, for the maintenance of public schools *within the said township*." (1 U. S. Land Laws, 13.) So in the Act of April 30th, 1802, relating to the Territory of Ohio, Sec. 7 granted section number sixteen in every township "*to the inhabitants of such township for the use of schools*." Again, the Act of March 20th, 1804, relating to the Territory of Indiana, reserved section sixteen in each township "for the support of schools *within the same*," and when Ohio and Indiana were admitted into the Union it was proposed by the National Government and accepted by them that "section sixteen in every township shall be granted to the inhabitants of such township for the use of schools." A proposition similar in terms was also made to and accepted by the States of Illinois, Missouri, Alabama, and Arkansas.

But the grants made in this form were found to operate not only very unequally, some of the sections being valueless while others were of great value, but to cause much difficulty in executing the

trust. The grants in Ohio and Indiana were directly to "the inhabitants of the township," and in Illinois, Alabama, Arkansas, and Missouri, to "the State, for the use of the inhabitants of such township for the use of schools." Thus the inhabitants of each township were the holders and owners of either the legal or equitable title to the land, and to a great extent the power of disposing of and controlling the property was vested in them, and not in the State. But most of the later grants have been made directly "to the State for the use of schools." Such is the case in the acts relating to the States of Michigan, Wisconsin, Iowa, and Florida. Under these earlier grants it is clear that the sixteenth section, or the proceeds thereof, could only be used for the support of schools in the township where it was located; but the later grants, including that to this State, leaves the State free to adopt such system upon this subject, to be general in its character, as the Legislature shall deem most beneficial to the people.

The construction we have given to the Act of Congress is further sustained by the terms of Sec. 2 of Art. 9 of the Constitution of this State, which was adopted prior to the passage of the Act of Congress. That section provides that "the proceeds of all lands that may be granted by the United States to this State for the support of schools, which may be sold and disposed of," together with other lands and funds, "shall be and remain a perpetual fund, the interest of which, together with all the rents of the unsold lands, and such other means as the Legislature may provide, *shall be inviolably appropriated to the support of common schools, throughout the State.*" Congress made the grant directly to the State, knowing that the latter had made it a part of its fundamental law, and therefore adopted, as its fixed and established policy, the equal distribution "throughout the State" of the interest of its common school fund, to be created from these very lands and other means. If the terms of the grant were doubtful, it would be the duty of the Courts to so construe them as, if possible, to make them harmonize and not conflict with the Constitution of the State.

In the exercise of the power thus vested in them by the Act of Congress and the State Constitution, the Legislature of this State, on the twenty-sixth day of April, 1858, passed an act providing for

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the sale of the sixteenth and thirty-sixth sections, and by section fifteen it was provided that all the moneys arising from the sale of these lands should be set apart as a Common School Fund, and that the interest thereof only should be appropriated "for the support and maintenance of common schools *in the township to which the land belonged*, from the sale of which the money accrued." This law established in this State the inequality which necessarily flowed from the earlier grants made by Congress, and its constitutionality may well be doubted. But, by an Act approved April 22d, 1861, and which took effect from and after its passage, the Legislature changed this system, and directed that the interest of the school fund derived from the sale of these sections should be "appropriated for the support and maintenance of common schools *throughout the State*." Thus the inequality was removed, the law made to conform to the requirements of the Constitution, and all portions of the State are equally benefited by the fund derived from these lands. We see no good reason for declaring this clause of the Act of 1861 unconstitutional. It is clearly in accordance with the terms and the spirit and intent of the Act of Congress making the grant, and with the provisions of the State Constitution. The Act of 1858 was not in the nature of a contract, nor did it confer any vested right to have the interest of the money derived from the sales of these sections perpetually appropriated as therein provided. The Legislature could amend or repeal that law without violating that clause in the National and State Constitutions, prohibiting the Legislature from passing a "law impairing the obligation of contracts." It was, like other statutes, subject to such modifications and changes as the Legislature might deem necessary and proper to make. The Act of Congress, as we have shown, grants the land directly to the State, and not to the townships, or the inhabitants thereof. The latter have no legal or equitable title to the land, and they have, therefore, no interest or estate to be affected by a change of the law. The Act of 1858 is in no sense a grant of the interest money to the several townships, but merely a provision as to the manner in which certain interest money derived from a certain fund shall be appropriated; and is, like any other law appropriating money, subject to the future control of the Legislature.

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Under the view we have thus taken of the law, the Court erred in overruling the demurrer to the complaint, as it should have been sustained.

The judgment is therefore reversed, and the Court below is directed to enter an order sustaining the demurrer.

GORDON v. CLARK.

AFFIDAVITS or documents copied into the transcript on appeal, but not made part of the record, either by a certificate of the Clerk or Judge, or by a statement or bill of exceptions, cannot be considered.

As a general rule an objection which, had it been taken in the Court below, might there have been obviated by amendment, cannot be raised for the first time in the Appellate Court.

APPEAL from the Ninth Judicial District.

E. Steele, for Appellant.

———, for Respondent.

CROCKER, J. delivered the opinion of the Court—COPE, C. J. and NORTON, J. concurring.

This is an appeal from an order granting a writ of assistance. The objection of the appellant is that the judgment or decree of foreclosure, as entered in the minutes of the Court and in the Judgment Book, does not state the amount for which it was rendered, the same being left blank. There is no statement on appeal. There are several affidavits and other documents copied into the transcript, which are not made part of the record, either by a certificate of the Clerk or Judge, or by a statement or bill of exceptions, and which we are therefore compelled to disregard. The transcript, however, contains the judgment roll, and the judgment attached thereto states the amount fully and specifically. Documents purporting to be similar judgments are, however, copied into the transcript which omit the amount, and in which blanks appear to have been left. Whether any of these were taken from the judgment book the record does not disclose, and in the absence of

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proper authentication we can only look to the judgment roll, which does not sustain the objection. The parties appeared to the motion for the writ of assistance, and so far as the record discloses, the appellant does not seem to have made any objection to the issuing of the writ, or taken any exception to the order made therefor, or pointed out any defect in the judgment, if any such existed. If the objection had been made in the Court below, there was undoubtedly sufficient in the records of the Court by which it could have been amended *nunc pro tunc*. As a general rule such objections as are capable of being obviated by amendment should be raised in the Court below and not in this Court for the first time.

The order is affirmed.

GRIFFITH v. CAVE.

A FERRYMAN who takes charge of a team driven upon his boat and directs an attempt to cross the stream, is liable as a common carrier for any loss that ensues in consequence of his negligence in the outfit or management of his boat, notwithstanding that the team was driven upon it at a time of peculiar danger and contrary to his express order.

In an action against a common carrier for negligence, evidence of a rule qualifying his duties under peculiar circumstances is inadmissible without first showing that the rule was known to the plaintiff either directly or constructively.

APPEAL from the Sixth Judicial District.

The facts are stated in the opinion.

———, for Appellant.

I. Defendant, as a common carrier, had a right to refuse to go unless he could go with present safety. The owner of the property must obey the lawful commands of the ferryman in relation thereto. (Story on Bailments, Sec. 496; Angell on Carriers, Secs. 82, 165-290; 2 B. & McCord, S. C., 19.) Even after acceptance by carrier the owner is obliged to obey his orders in relation to the property. (1 McCord, S. C., 45.)

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II. The Court erred in its instructions to the jury. (See authorities above cited.)

III. Evidence of the rule governing this and other ferries on the river, in respect to crossing at the time of passage of steamers, should have been received.

Geo. Cadwallader, for Appellant.

I. The proofs showed that defendant received and took charge of the teams. The instructions of the Court upon this state of fact were correct. (*May v. Hanson*, 5 Cal. 360; Angell on Carriers, Sec. 82; *Fairchild v. Cal. Stage Co.*, 13 Cal. 399.)

II. The evidence offered to show a rule at this and other ferries was inadmissible, without first showing knowledge of the rule by plaintiff. (Angell on Carriers, Secs. 244, 245; 6 How. 344.)

CROCKER, J. delivered the opinion of the Court—COPE, C. J. and NORTON, J. concurring.

This is an action against the defendant, a ferryman, to recover the value of a pair of mules, harness, and wagon, lost from the defendant's ferry-boat, while crossing the Sacramento River. The plaintiff recovered judgment, from which the defendant appeals.

The appellant contends that he refused to receive the teams at the time they drove on the ferry-boat, on account of the steamer being about to pass, but the evidence upon this point is conflicting. It shows, however, that both teams drove on the boat, and had proceeded, under the direction of the ferryman, a portion of the distance across the river, when the accident occurred. This was sufficient to establish the fact that the defendant had accepted and received the property, and his liability as common carrier had fully attached when the loss accrued. (*May v. Hanson*, 5 Cal. 360.)

The Court instructed the jury as follows: "If Griffith drove on the boat against the express order of the ferryman, it was the duty of the ferryman to refuse to take charge of the mules, or if he did take charge of them it was his duty to provide against loss in consequence of the swell of the water against the boat. If it was, in his judgment, unsafe to cross and unsafe to leave them there, if he took charge of them, and did not like to leave them in the hands

of Griffith, he should have directed Griffith, or himself unhitched the mules and placed them in a position so there would be no danger. He might elect to leave Griffith to take the consequence of his refusal to obey the order, but if the ferryman took charge of them, and there was carelessness or negligence thereafter on his part, he would be responsible." The defendant then asked the Court to give the following, which was refused, and which is alleged as error: "If the plaintiff drove on the boat in violation of the express order of the ferryman, and there is a loss, the ferryman is not responsible. He is not compelled to leave his boat near the shore to be destroyed." To which the Court replied as follows: "If he took charge of the boat, pushed it in the stream and was crossing, I think he took charge of the boat and the load upon it, and if there was carelessness or negligence thereafter, he is liable."

The charge of the Court as given was certainly as favorable to the defendant as the law would justify. There was no error in refusing the instruction as asked by the defendant, because it predicated the exemption from liability upon the single fact that the plaintiff drove on the boat in violation of the express order of the ferryman, when that might be true, and still the ferryman may have accepted and received them afterwards, by which his liability would attach.

It is clearly the duty of a ferryman to provide suitable boats, and all the conveniences necessary to insure the safe transportation of persons and property. In the present case the defendant's boat was unprovided with any small boat or with any gates, ropes, or chains, to confine teams thereon, and prevent them from running or backing off the boat when in the stream; and the testimony renders it quite evident that the loss occurred for want of these necessary means of safety. It was clearly negligence on the part of the defendant in not providing such conveniences.

On the trial a witness was asked by the defendant, whether he knew of any regular established rule or practice at the ferry in reference to steamers passing, to which the plaintiff objected, unless the rule was posted up, or the plaintiff had special knowledge of it, and the Court sustained the objection; and, also, as to proof of rules prevailing at other ferries upon the Sacramento River upon

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the same subject, and this is assigned as error. It is clear that proof of the rules of other ferries was inadmissible. It is essential in all such cases that the notice of any rule upon such subject shall be brought home to the person employing the carrier, either directly or constructively. (Angell on Carriers, Sec. 247.) In the present case the defendant did not offer to show that the plaintiff had any direct or indirect notice of the alleged rule, and that there was, therefore no error in excluding the evidence.

Judgment affirmed.

JENKINS v. THE CALIFORNIA STAGE CO.

THE principal place of business of a corporation is its *residence* within the meaning of that term as used in Sec. 20 of the Practice Act, fixing the place of trial.

On application by defendant* to change the place of trial on the ground of residence, the plaintiff may resist by showing that the convenience of witnesses and the ends of justice will be promoted by the retention of the cause, and the Court may, on a proper showing of such facts, refuse to change the venue.

APPEAL from the Fourteenth Judicial District.

At the time of the proceedings on* motion for change of venue referred to in the opinion, no pleadings had been filed on the part of defendant.

C. E. Filkins, for Appellant.

I. The principal place of business of a corporation is its residence within the meaning of that term in the statute relating to place of trial. (*Louisville R. R. Co. v. Letson*, 2 How., U. S., 557; Angell & Ames on Corporations, Sec. 407.)

II. Until issue of fact joined, it is impossible to determine the question of convenience of witnesses, and the motion for change of venue on that ground should be made after the transfer to the Court in the county where defendant resides.

John Garber, for Respondents.

Cited *Loehr v. Latham* (15 Cal. 418).

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CROCKER, J. delivered the opinion of the Court—COPE, C. J. and NORTON, J. concurring.

This is an appeal from an order refusing to change the place of trial, on motion made by the defendants. The action was brought in Nevada County, and the application was made on the ground that the defendant was a corporation, that its principal place of business was in Yuba County, and that the latter county was, therefore, the "residence" of the corporation within the meaning of that word as used in Sec. 20 of the Practice Act. The application was opposed on the ground that the convenience of witnesses required that the action should be tried in Nevada County. The modern decisions very generally concur in giving corporations a local existence, like persons, and hold them to be properly included within the terms citizens, inhabitants, residents, and the like. (*Louisville R. Co. v. Letson*, 2 How., U. S., 497; *Angell & Ames on Corporations*, 404-407, 6, 265, 440.) Every corporation has some locality where its principal office or place of business is established, and it may very properly be said to "reside" at such locality, and to be included within that term as used in Sec. 20 of the Practice Act.

When a defendant applies for a change of the place of trial, on the ground that the action was not brought in the county where he resides, the plaintiff has a right to oppose the motion by showing that the "convenience of witnesses and the ends of justice would be promoted" by refusing the change, and such facts should govern and control the Court in determining the question whether the application for the change should be granted or not. (*Loehr v. Latham*, 15 Cal. 418; *Pierson v. McCahill*, 22 Id. —.) There was no abuse of the discretion which the law vests in the District Court upon these questions in its action in this case, and the order is therefore affirmed.

Ghirardelli v. McDermott.

GHIRARDELLI v. McDERMOTT.

A VERIFIED answer, which, in any part contains a distinct denial of a fact material to plaintiff's recovery, cannot, whatever its defects, be treated as a nullity so as to entitle plaintiff to judgment on the pleadings.

As between the parties to a sale of goods on store in a warehouse, the delivery of an order on the warehouseman for the goods by the seller to the buyer is a delivery, and passes the title to the latter so as to render him liable for the price.

Where a sale of goods was made through a broker and perfected by delivery of an order for the same upon a warehouseman, which order the buyer shortly after returned to the broker to deliver to the seller, with notice that the goods would not be taken, and the broker tendered the order to the seller, who refused to receive it: *held*, that the broker, in receiving the order from the buyer, acted as his agent, and that the reception of it by him did not effect a rescission of the contract.

APPEAL from the Fourth Judicial District.

The complaint, which is verified, alleges a sale and delivery of two hundred mats of rice to defendant at San Francisco, for which he promised to pay eight hundred and fifty dollars. The answer, also verified, in its first clause denies, in a conjunctive form, the allegations of the complaint as to a sale and delivery at San Francisco of two hundred mats of rice at the price of eight hundred and fifty dollars; and in the second clause sets up a conditional purchase and avers a breach of the condition by plaintiff; and in a third clause, for a separate defense, denies that there was any delivery at any time or place of any rice by plaintiff to defendant. All other material facts are stated in the opinion. Defendant had judgment, and plaintiff appeals.

R. R. Provines, for Appellant.

I. The defendant's answer admits all the allegations of plaintiff's complaint, and the Court below erred in refusing plaintiff's motion for judgment on the pleadings, and also in nonsuiting plaintiff. (*Dewey v. Bowman*, 8 Cal. 149; *Blankman v. Vallejo*, 15 Id. 644; *Castro v. Wetmore*, 16 Id. 380; *Busenius v. Coffee*, 14 Id. 92, 93; *Burke v. T. M. Water Co.*, 12 Id. 407; *Ord v.*

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Uncle Sam, 13 Id. 372; *Kuland v. Sedgwick*, 17 Id. 127; *Caulfield v. Saunders*, Id. 571; *Higgins v. Wortell*, 18 Id. 338.)

II. The delivery of the order for the rice was a delivery of the rice, sufficient, as between the parties, to vest the title in defendant. (Story on Sales, Secs. 311, 312, p. 250; *Horr v. Barker*, 8 Cal. 613, 614; *Wilkes v. Ferris*, 5 Johns. 335; *Hollingsworth v. Napier*, 3 Caines, 185; *Harman v. Anderson*, 2 Camp. 243; *Manton v. Moore*, 7 Term, 67; *Chapman v. Searle*, 3 Pick. 38; *Tuxworth v. Moore*, 9 Id. 349; *Linton v. Butz*, 7 Barr, 89; *Pleasants v. Pendleton*, 6 Rand. 473; *Clark v. Rush*, 19 Cal. 396; Hilliard on Sales, 95, Secs. 9–11.)

The case of *Stevens v. Stuart* (3 Cal. 148) recognizes the doctrine that the delivery of an order for the goods is a delivery of the goods, where it can be followed by actual delivery—such, as appears from the evidence, could have been made in this case, had the order ever been presented to the person in whose charge the goods were. But the order never was presented, nor was the rice ever demanded of the bailee.

III. There is no departure in the replication from any material allegation of the complaint. (1 Chitty's Pl. 685.)

IV. Defendant's delivering the order for the rice to the broker with a request to return it to plaintiff, was not a cancellation of the contract of sale. The broker's functions, as such, were previously ended, and *pro hac vice* the defendant made him his own exclusive agent.

H. G. Worthington, for Respondent.

CROCKER, J. delivered the opinion of the Court—COPE, C. J. and NORTON, J. concurring.

This is an action to recover the price of a quantity of rice alleged to have been sold and delivered by the plaintiff to the defendant. The defendant recovered a judgment of nonsuit, from which the plaintiff appeals. The pleadings are under oath, and the plaintiff moved for judgment on the pleadings, which was overruled, and this is assigned as error. The first part of the answer is clearly insufficient, as it denies the allegations of the complaint in the con-

junctive ; but in a subsequent portion of the answer the defendant distinctly denies that the plaintiff ever delivered the rice in accordance with the contract, and this is sufficient to raise an issue, and the Court, therefore, properly overruled the motion.

It appears from the pleadings and evidence that the sale of the rice was made through a broker in the City of San Francisco ; that at the time of the sale the rice was in a warehouse in Stockton ; that the defendant accepted and received an order drawn by the plaintiff on the warehouseman for the delivery of the rice to the defendant ; that he never presented the order to the warehouseman, but, three days after the sale, took the order to the broker, told him that he could not take the rice, because there were only sixty mats of the two hundred sold that were fit to be delivered, and gave the order to him to return to the plaintiff ; the broker took the order to the plaintiff, who refused to receive it, and thereupon, on the same day, he took it back to the defendant, who refused to receive it back. It appears that the rice was in the warehouse at Stockton, in good condition, and ready to be delivered upon presentation of the order. This is the substance of the plaintiff's evidence. After he had closed his testimony, the defendant* moved for a nonsuit, on the ground, first, because there was a departure in pleading on the part of the plaintiff, as his complaint averred a sale and delivery of the rice at San Francisco, and the replication averred that at the time of the sale the rice was at Stockton ; second, because there was no delivery of the rice by the plaintiff to the defendant ; third, that the contract of sale was rescinded by the broker taking the order of delivery from the defendant. The Court sustained the motion for a nonsuit, and this is assigned as error.

The first ground of defendant's motion is untenable. There is no substantial variance between the complaint and the replication. The second ground is equally invalid. As between the parties the delivery of the order to the defendant, on the warehouseman, who had the goods in store, was clearly sufficient to pass the title to the goods to him, and rendered him liable to pay the price. (Story on Sales, Secs. 312, 314 ; *Horr v. Barber*, 8 Cal. 614 ; *Clark v. Rush*, 19 Id. 396.) The third ground is also untenable. In

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placing the order in the hands of the broker to deliver to the plaintiff, the defendant constituted him his agent for that purpose. He was not the agent of the plaintiff to receive the order, and when he presented the order to the plaintiff he refused to receive it, and these facts did not constitute any rescission of the contract. The Court, therefore, erred in granting the nonsuit.

The judgment is therefore reversed, and the cause remanded for a new trial.

REAL DEL MONTE CONSOLIDATED G. & S. M. CO.
v. C. D. THOMPSON.

THE complaint charged a trespass against "C. D. Thompson and the other owners or claimants of the Paul Thompson Quartz Lode." Thompson alone was served with summons, and an answer was filed on behalf of "defendants," without naming them. One Trainovitch was offered as a witness for the defense, and stated that at the time of the commencement of the action he owned an interest in the Paul Thompson Lode and had agreed to pay his proportion of the costs: *held*, that Thompson was the only defendant in the action, and that a release from him to the witness rendered the latter competent.

In an action of trespass for injury to a quartz lode, when T. alone was made a defendant, and by his answer took issue upon the title, an owner of a part of the same lode who had since the commencement of the action but before trial sold his interest in the lode for a price contingent on the validity of his title thereto: *held*, to have no interest which disqualified him as a witness for the defense, as it does not appear that the judgment in this action will affect or determine the title to the part thus sold.

Error, in refusing to permit a witness to answer a proper question, becomes immaterial by the introduction of the same matter to which the question was pointed, under a subsequent interrogatory.

APPEAL from the Sixteenth Judicial District.

The facts are stated in the opinion.

A. P. Crittenden, for Appellant.

I. The witness, Trainovitch, was incompetent. The action was defended for his immediate benefit; and he had a present, certain, and vested interest in the event. He was an owner in the Paul

Thompson claim when this action was commenced and the summons served, and for a long time thereafter, and had agreed with the other owners to pay his proportion of the expenses of defending the suit. He was therefore liable to his coöwners, and, as to them, his interest was precisely the same as if he had been a party defendant on the record.

The release of C. D. Thompson was ineffectual to discharge that liability, except as to Thompson himself. To the other owners, the liability of the witness continued. He was also a warrantor to Castro. He had a certain sum of money dependent on the result, and would either "gain or lose by the direct legal operation and effect of the judgment." (Practice Act, Secs. 392, 393; *McEwen et al. v. Johnson et al.*, 7 Cal. 258; *Kimball v. Gearhart*, 12 Id. 27; *Packer v. Heaton*, 9 Id. 568; *Mokelumne Hill Canal Co. v. Woodbury*, 14 Id. 265.)

II. The Court erred in sustaining the defendant's objections to the questions put by plaintiff's counsel to the witness, W. J. Smith, called in rebuttal.

L. Quint, for Respondent.

I. The record discloses but one defendant against whom judgment could be rendered and execution issued. C. D. Thompson is the only person named. If the plaintiffs had sought to charge any other person or persons except him, they should have designated them under a fictitious name. (*Morgan v. Thrift*, 2 Cal. 562; *McNally v. Mott*, 3 Id. 235; *Sutter v. Cox*, 6 Id. 515.) Hence, we hold, that Nicholas Trainovitch was not a party to the suit, and not liable; certainly no judgment could have been rendered against him.

Even if it were not necessary to designate the defendants sought to be charged by a fictitious name, the plaintiffs could only proceed against the party personally served. When the record shows in general terms the appearance of the parties, the appearance will be confined to the parties personally served with process. (*Chester v. Miller*, 13 Cal. 558; *Miller v. Ewing*, 8 S. & M. 421; *Taney v. Jordan*, 4 How. Mass. 401; *Dean v. McKinstry*, 2 S. & M. 218.)

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II. Even if the Court should have allowed the questions in rebuttal, the plaintiffs were certainly not injured thereby, because the facts to which the question pointed were obtained by and under an interrogatory in another form.

CROCKER, J. delivered the opinion of the Court—NORTON, J. concurring.

This is an action brought by the plaintiffs, a corporation, against C. D. Thompson and the other owners or claimants of the Paul Thompson Quartz Lode, to recover damages for an alleged trespass in working a lode claimed by the plaintiffs, and for an injunction against future trespasses. The summons was issued and served on Thompson alone, who appeared and filed an answer. The case was tried and judgment rendered for the defendant; from which, and from an order overruling a motion for a new trial, the plaintiffs appeal.

On the trial the defendant offered one Trainovitch as a witness, who testified that at the commencement of the suit he was a member of the company that sunk the shaft complained of, but had sold out three or four months before; that he had agreed to pay his proportion of the expenses of the suit, according to the quantity of ground he held; that the company had deeded to him the portion of ground they had agreed to, twenty-five feet, of which he had sold to one Castro, and had taken Castro's note for a part of the purchase money, and had agreed that if he did not give him a good title he would give him up his note. Thereupon the defendant, Thompson, executed to witness a release from all actions and all liability which might accrue to him by reason of any judgment which might be obtained against him in the action. The plaintiff objected that the witness was incompetent on the ground of interest; the objection was overruled and the witness allowed to testify, and this is now assigned as error. The witness was not a party to the action. The statement that the action was brought against "C. D. Thompson and the other owners or claimants of the Paul Thompson Quartz Lode," only made Thompson defendant, unless other persons were brought in and made parties by proper proceedings under the direction of the Court, which was not done in this case. It is urged,

however, that the witness agreed with the *other owners* to pay his proportion of the expenses; that he was therefore liable to his coowners, and the release by Thompson did not release him from that liability, and therefore he still continued interested to that extent in the result of the suit. It is evident that the agreement was not between the witness and the other owners, but between the defendant, Thompson, who was the person legally liable for the costs and expenses, being the sole defendant to the action, and the other owners, including the witness, and therefore Thompson's release effectually discharged the witness from his liability under that agreement.

It is also urged that he was interested under his agreement with Castro; that the purchase money due him from Castro was dependent on this action, and that he would therefore either "gain or lose by the direct legal operation and effect of the judgment." The agreement with Castro was not that he would give up the note if Thompson lost the suit, but if he did not give him a good title to the twenty-five feet of a quartz lode which he had sold him. It nowhere appears that the judgment in this action will in any way affect or determine the title to this twenty-five feet sold by the witness to Castro. If such is the fact, the plaintiff should have shown it clearly, as the foundation of his objection; not having done so, his objection cannot be sustained. We have no right to presume that the witness was interested; the fact of interest should be clearly disclosed by the record. It follows, that there was no error in admitting the witness to testify.

After the defendant had closed his testimony, the plaintiffs called one Smith as a rebutting witness, and asked him these questions: "First—What was the appearance of the ground immediately after the stripping had been done last year? Second—Was there developed by that stripping any indication of a quartz lead?" It appears that the plaintiff had examined several witnesses in the opening of the case in relation to the stripping of the lead, and the result of it. Some evidence was introduced by the defendant in relation to other leads crossing the lead thus stripped by the plaintiffs, and the latter contend that they had a right to put these questions to rebut this evidence of the defendant. The Court, however, sustained defendant's objection to these questions, and this is also assigned as

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error. The record shows that although these two questions were ruled out, yet the plaintiffs were permitted subsequently to put other questions to the witness, in answering which the witness testified to the same matter to which these questions pointed, and they therefore suffered no injury by this ruling of the Court.

The judgment is affirmed.

CONLIN v. SEAMEN.

THE Street Superintendent of San Francisco, under the Consolidation Act, has power to enlarge the time for completion of a contract for street improvements made by him, and if any property owner feels aggrieved by such action he must appeal to the Board of Supervisors, or he will be deemed to have acquiesced therein.

In a proceeding for the improvement of streets in San Francisco by contract, under the regulations of the Consolidation Act, the liability of the real owner is not released or affected by an erroneous assessment of the tax upon his property to another person.

The complaint in an action by a contractor against a property owner, upon a contract for improving streets in San Francisco in pursuance of the provisions of the Consolidation Act, need not aver any special demand upon the defendant other than a compliance with the forty-ninth section of the act.

APPEAL from the Fourth Judicial District.

The facts sufficiently appear in the opinion.

Waller & Moore, for Appellant.

I. The complaint shows affirmatively that this defendant never was charged by plaintiff for this work nor on this contract; on the contrary, by the contract and warrant this property was assessed and the charge for the work was made to Lucas, Turner & Co., and not to defendant. (See Secs. 8-10 amending Secs. 48-50, Laws of 1861, 547, 548.) The warrant is made *prima facie* proof in plaintiff's favor (Laws of 1861, 548, Sec. 10, amending Sec. 50), but plaintiff shows by this warrant that Lucas, Turner & Co., not this defendant, are the owners. Plaintiff is therefore estopped from charging any other party than Lucas, Turner & Co. with the liability.

II. No demand for the payment of this street work was made upon the defendant as required by statute. The complaint alleges that the demand was made upon Lucas, Turner & Co.'s agent. No allegations of demand upon this defendant, or that he could not conveniently be found, as required by the said Sec. 9 amending Sec. 49. (See also Laws of 1862, Sec. 11, p. 398.)

III. The Superintendent had no power to enlarge the time for completion of the contract. It would be palpably unjust to property owners, inducive of fraud and collusion between contractors and the Street Superintendent, to award a contract and then empower the Superintendent to extend *ad libitum* the time in the contractor's favor. Time is of the essence of the contract. Whether the law requires a clause limiting the time or not, if such a clause is inserted it binds the parties; and the property owner who has the statutory right to take the contract with the time clause, is justly supposed to accept or decline the contract in view of that clause, which may make a vast difference in the question of expense in performing the contract. Sec. 7, Stat. of 1862, 394, purporting to legalize extensions of contracts made before that time is, so far as it attempts this, unconstitutional, null, and void. It is a judicial act *ex post facto*, retroactive, and no Court should sustain it. (Sedgwick on Statutes, 166, 169, 177; Constitution of Cal., Art. 3; *Guy v. Hermance*, 5 Cal. 74; 7 Johns. 508, 509; 7 Hill. 80.)

IV. There is no force in plaintiff's allegation that defendant made no appeal to the Board of Supervisors. 1. The alleged extension of the contract annulled that contract. It was therefore no longer within the jurisdiction of the Board. (33 Barb. 147.) 2. Defendant had nothing to appeal from since he was never charged with the assessment. 3. Plaintiff has chosen to allege facts which, if true, exhibit no cause of action. He surely cannot recover when he sets forth that he has failed to comply with the terms of the statute under which he seeks to recover *stricti juris*. If he shows that he has not such a "warrant" as entitles him to sue, or that by reason of acts or omissions he is not entitled to the statutory "warrant," he shows himself out of Court.

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Robert C. and Daniel Rogers, for Respondent.

The extension of the time in which to complete the work was made by the Superintendent of Streets, one of the parties to the contract, upon the application of the contractor and his sureties; and as a party to the contract it was an act which he could legally do. Sec. 7 of the Act of 1862 (Statutes of 1862, 391) declares that in those cases where the time has been extended "such act shall be deemed and held to have been legally done, and it shall be so held in all Courts of this State." The exercise of such a power is not within the prohibited powers of the Legislature. (*Hart v. Gaven*, 12 Cal. 478; *People v. Seymour*, 16 Id. 332.)

CROCKER, J. delivered the opinion of the Court—NORTON, J. concurring.

This is an action brought by the assignee of a street contractor against a property holder to enforce a lien and payment for work done in grading Lombard Street, between Stockton and Mason streets, in the City of San Francisco. The defendant demurred to the complaint on the ground, among others, that it did not state facts sufficient to constitute a cause of action. The Court below overruled the demurrer, and no answer being filed, rendered a judgment for the plaintiff, from which the defendant appeals.

The first objection to the complaint is, that the work was not done within the one hundred and thirty-five days specified in the contract; that the Superintendent had no authority to extend the time, as alleged in the complaint, and therefore the defendant is discharged from all liability. Sec. 43 of the act known as the Consolidation Law, as amended by the Act of 1861, confers the power of entering into contracts awarded by the Board of Supervisors for the grading of streets, upon the Superintendent of Streets, who is for that purpose the official agent of the city and the lot-holders. Sec. 44 provides that the work "must in all cases be done under the direction and to the satisfaction of the Superintendent," and he is required to make the assessment and apportionment of the expenses. Sec. 45 provides that "if any party directly interested in any such work, contract, or assessment, shall feel aggrieved by the acts or determination of the said Superintendent in relation

thereto, he may appeal to the Board of Supervisors, whose decision thereon, upon hearing, shall be final." We think it clear that the law vests full power in the Superintendent to make the contract, and also if he sees fit, to fix therein the time for the completion of the work, and to enlarge the time if he thinks proper. If in the performance of any of these acts any person directly interested feels aggrieved thereby, he has a remedy by appeal to the Board of Supervisors, and failing to so appeal he is to be deemed to have acquiesced therein. This objection, therefore, is not well taken.

The next objection is that as the complaint shows that the property was assessed to Lucas, Turner & Co., and not to the defendant, therefore he is not liable. The complaint also avers that the defendant was, at the time of the commencement of the proceedings, and ever since has been, the owner and in the possession of the premises, and the demurrer admits these facts. It is the *owner* that is made liable for the expense of grading; and the fact that the assessor erred, or was mistaken in the name of the true owner of the premises, does not release the real owner, or transfer the liability to a person who has no interest in the property, or estop the plaintiff from enforcing his claim against the real party in interest who has received the benefit of the work performed by the plaintiff's assignor.

It is also urged that the complaint is defective in not averring a special demand upon the defendant. The forty-ninth section of the act provides that "the contractor or his agent shall call upon the person so assessed, or their agents, if they can conveniently be found, and if payment be not made, shall demand payment upon the premises." The complaint fully avers a performance of these requirements. The act does not make a special demand upon the defendant necessary before a suit can be brought. The Court below properly overruled the demurrer.

The judgment is affirmed.

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HOUSTON v. MCKENNA.

Conlin v. Seamen (ante, 546), to the effect that the Superintendent of Streets of San Francisco has the power to extend the time for completion of contracts for the improvement of streets made by him, affirmed.

The plaintiff in November, 1860, entered into a contract for the improvement of streets in San Francisco under the law of 1859, which provided that for payment an assessment should be levied upon the adjacent lots in proportion to their respective values. Before the completion of the work the Amendatory Act of 1861 was passed, providing for an assessment in payment of such contracts according to the street frontage of each lot: *held*, that the provisions of the law of 1859 respecting the mode of assessment was part of the contract, and that the assessment, though made after the amendatory act, must be in the mode prescribed by the old law.

Under the Act of 1859 the Board of Supervisors of San Francisco have power to provide for the grading of all located streets, whether new or old, and as well of those lying east of Larkin Street as to the west of it.

APPEAL from the Twelfth Judicial District.

The facts are stated in the opinion.

Pratt & Clark, for Appellant.

I. The time within which the work shall be done, is not of the essence of the contract. In this respect, it is only essential that the directions of the Superintendent shall be followed, and the performance of the work be had and done to his satisfaction.

The law does not contemplate or require that the offer by the contractor to do the work, nor its acceptance by the Board, shall contain any period within which it shall be performed. Only the quantity is named in the invited proposals, and the price fixed in the offered bid put in by the contractor; but, as the work is to be done to the satisfaction of the Superintendent, and must be so inserted in the contract, it is to be presumed that in the discharge of his official duty the Superintendent will not be "satisfied" to allow it to be done, and accepted by him, except as diligently as the nature of the work will admit, and within a reasonable time.

II. The assessment was rightly made as required by the law of March 28th, 1859, the one under which the contract was made, and not under that of May 18th, 1861, passed while the work was in progress of completion.

The cost of the work certainly could not have been assessed under the law of 1861, for it established a new measure of liability not in force at the date of the contract; and if unable to be made on the basis of obligation of the property owners fixed by the law of 1859, in force when the contract was taken, then it could not have been made at all, and the contractor would be left remediless to enforce payment in any manner, or out of any body.

The provisions of the law of 1859 entered into and formed part of the contract; they gave alike a right of action to the contractor, assuring him the enforcement against each owner of a determinate amount, and at the same time fixed and limited the exact extent of each owner's liability. Any change, therefore, of the law, made under the pretense of altering the remedy, which would work either a substantial injury to the rights of the contractor or alter the liability of the property holders, would be beyond the law-making power.

Legislation is incompetent to work such changes. It can neither impair the obligation of contracts, nor destroy or impair rights in attempts to change the remedy. (10 Cal. 308; 2 How., U. S., 608; *Creighton v. Pragg*, 21 Cal. 115.)

Porter & Sawyer, for Respondent.

I. There is no provision of any act previous to the Act of May 25th, 1862, giving the Superintendent any authority to extend the time, or interfere with the contract in any manner, after it was executed.

All the authority conferred upon the Superintendent in the matter, was to make the contract. (Stat. of 1859, 144, Sec. 43.)

Having made the contract, the Superintendent was *functus officio*. (*Allen v. Cooper*, 22 Maine, 136.)

When time is expressed in the contract, it becomes the essence of the contract. (22 Maine, 136; Story on Cont., Secs. 970, 971.)

II. The assessment was made (the complaint states) according to the last assessment roll, upon the valuation of the lands fronting on Mason Street. The complaint shows that the assessment was made after the passage of the Amendatory Act of May 18th, 1861,

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and this was the only law then in force relative to such assessments. The old law was Sec. 42, p. 167 of Statutes of 1856. This was amended by the Act of 1859 (Stat. of 1859, 144, Sec. 7), and again amended by Act of 1861 (Stat. of 1861, 546, Sec. 6.)

III. The Board of Supervisors never had jurisdiction over the subject matter. By the Statutes of 1856 (156, Sec. 39), and Statutes of 1859 (143, Secs. 5, 6), there are two distinct modes of proceedings to grade streets, and these relate two sections of the city and county.

The first mode, is by Sec. 5 (Stat. 1859, 143), where the Supervisors may initiate the proceedings; and the second, is by Sec. 6, same page, where the first steps are taken by the property holders. There can be no dispute about these two modes. The first, is only applicable to that portion of the city and county within its corporate limits, west of Larkin Street and south-west of Johnson Street. (Stat. 1856, 156, Sec. 39; Id. 1859, 143, Sec. 5, amendatory of Sec. 40 of 1856, 156.)

CROCKER, J. delivered the opinion of the Court—NORTON, J. concurring.

This is an action brought by a contractor against a property holder in San Francisco, to enforce a lien and payment for work done in grading Mason Street from O'Farrell to Ellis streets. The defendant demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action, and that it was ambiguous, unintelligible, and uncertain. The Court below sustained the demurrer, and, the plaintiff failing to amend his complaint, rendered a final judgment for the defendant, from which the plaintiff appeals.

It appears from the complaint that the work was not completed within the time limited in the contract, but the time was twice extended by the Superintendent of Streets, and it is insisted that the Superintendent had no power to enlarge the time, and therefore the plaintiff has no right to recover. We held in the case of *Conlin v. Seamen* (ante, 546), that the Superintendent had full power and control over the matter, and that an extension of the time by him did not release the property holders from their liability to pay the assessment.

The complaint avers that the proceedings for the grading of this street commenced on the twenty-seventh day of August, 1860; that the Superintendent of Streets, on the twenty-third day of November, 1860, entered into a contract with the plaintiff to do the work; that he performed the work, which was duly approved by the Superintendent, who, on the fourth day of October, 1861, assessed and apportioned the amount upon the adjacent lots, each lot being separately assessed in proportion to the assessed value of the same, according to the assessment roll last completed prior to the making of the contract. The defendant insists that the assessment is void, because not made in accordance with the provisions of the Act of May 18th, 1861, which was in force when the assessment was made, and which provides that "the expense of construction of any street, or portion of a street, shall be assessed upon the lots of land fronting thereon, each lot or portion of a lot being separately assessed, in proportion to its frontage, at a rate per front foot to cover the total expenses of the work." On the contrary, the plaintiff contends that the law in force at the time the contract was made—the Act of March 28th, 1859—controls the rights of the plaintiff, and that the assessment, being made in accordance with that law, is valid. The difference between the two statutes is simply this—the Act of 1859 provides that assessments shall be according to the value of the lots, and the Act of 1861, according to the street frontage of each lot.

The plaintiff made the contract, in view of the right, which the law then in force gave him, to resort to the property and its owners for payment of the work done in grading the street. In this respect the law of 1859, so far as it regulated the extent and nature of that liability, formed part of the contract, and could not be essentially changed without impairing the obligation of the contract, which could not be done without a violation of the Constitution. The Act of 1861 changes the rights of the plaintiff and the liability of the property and its owners, by changing the extent of that liability—making some to pay more and others a less sum than they would have been liable to pay under the Act of 1859. Such a result can only be avoided by giving the Act of 1861 a prospective effect—that is, limiting its application to those contracts made after it took effect.

 Simonton v. El Dorado County.

It is a well settled rule of law that statutes should not receive a retroactive construction, unless the intention of the Legislature is so clear and positive as by no possibility to admit of any other construction. (Sedgwick on Stat. and Con. Law, 193, 407.) There is nothing in the language of the Act of 1861 amendatory of Sec. 36, which makes it necessary to give it a retroactive effect, so as necessarily to include contracts made before its passage, and it should therefore be construed to apply only to subsequent contracts. (*Creighton v. Pragg*, 21 Cal. 115; *Scarborough v. Dugan*, 10 Id. 305.)

It is also urged that the Board of Supervisors have no power to initiate proceedings for the grading of streets east of Larkin; and, as this street is east of Larkin, therefore the whole proceedings are void, for want of jurisdiction. Sec. 39 of the Act of 1856 gives the Board power to lay out and open *new* streets within the former corporate limits of the city, and west of Larkin and south-west of Johnson streets. Sec. 40, as amended in 1859, gives them power, "when any street is located," to order it graded. This evidently applies to all located streets, whether new or old, and this point, therefore, is not tenable.

The judgment of the Court below is reversed, the order sustaining the demurrer is set aside, and the defendant is allowed ten days, from the service of a notice of the filing of the *remittitur* in the Court below to answer the complaint.*

 SIMONTON v. EL DORADO COUNTY.

By an act passed in 1855, Constables in El Dorado County were allowed the same fees as Sheriffs for like services in criminal cases. In 1859 an act was passed allowing the Sheriff of that county fifty cents per mile for travel in making an arrest. In 1860, by a special act making no reference to Constables, the Sheriff in that county was made a salaried officer, and allowed no fees—Sec. 15 providing that all former acts "conflicting with the provisions of this

* *Houston v. Louis et al.* and *Houston v. Gautier et al.*, involving the same questions were decided at the same term upon the authority of the foregoing case, and like orders made therein.

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act are hereby repealed so far as they relate to the said several officers herein named." In 1862 an act amendatory of the act of 1860 was passed, the second section of which provided, as an amendment to Sec. 8 of the original act, that two deputies should be allowed the Sheriff, and that "the said deputies or other officers performing such service should receive twenty cents per mile in criminal cases for each mile actually traveled in going only; and Sec. 5 of which declared that "so much of any acts or parts of acts (as are) inconsistent with the provisions of this act are hereby repealed:" *held*, that the last act applied to Constables, and repealed all the provisions of former acts in reference to their mileage in criminal cases, and that they are entitled therefore to only twenty cents per mile for travel in such cases.

APPEAL from the Eleventh Judicial District.

The facts are stated in the opinion.

John Hume, District Attorney, for Appellant.

S. W. Sanderson, for Respondent.

CROCKER, J. delivered the opinion of the Court—COPE, C. J. concurring.

This is an action to recover fees for services as a Constable in criminal cases. The Board of Supervisors allowed the plaintiff's account at the rate of twenty cents per mile, in making arrests in criminal cases, and the plaintiff claims that he is entitled to fifty cents per mile in such cases. The plaintiff recovered judgment in the Court below, from which the defendants appeal.

Several statutes have been passed regulating the fees of certain officers in El Dorado County, among others one, in 1860, which regulated the fees of Sheriff. This law was afterward amended in 1861, and again in 1862; by Sec. 2 of the latter act it is provided that the Sheriff of that county shall be allowed two deputies, that "the said deputies, or other officers performing such service, shall receive twenty cents per mile, in criminal cases, for each mile actually traveled in going, only," and that such compensation shall be paid out of the county treasury. Sec. 5 of this act provides that "so much of any act or acts [as are] inconsistent with the provisions of this act are hereby repealed." (Stat. of 1862, 129, 130.)

The services in this case were rendered since this last act took

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effect, and the compensation therefor is consequently regulated by its provisions. The allowances for services in criminal cases applies to Deputy Sheriffs and "all other officers performing such services," which clearly includes Constables. The rate of compensation is fixed at twenty cents per mile for each mile actually traveled in going only; and that is the amount the plaintiff is entitled to receive for his services.

But the respondent claims that by the twelfth section of the Act of 1855 (Stat. of 1855, 85, 86), he was allowed the same fees as Sheriffs for like services in criminal cases; that by the special act of 1859 (Stat. of 1859, 362), the Sheriff of El Dorado County was allowed "for service of any process, in criminal cases, for each mile necessarily traveled, twenty cents; and in case of an arrest, fifty cents per mile;" that those laws still remain in force as to Constables of that county, and that he is therefore entitled to fees at the rate fixed by the latter act. These Acts of 1855 and 1859, if not repealed in direct terms by other acts subsequently passed, are clearly inconsistent with the provisions of the Act of 1862, so far as they relate to the question before us, and were therefore repealed by Sec. 5 of the latter act. The respondent is not, therefore, entitled to compensation at the rates fixed by the Act of 1859.

The Board of Supervisors allowed him the full amount that he was entitled to, and he has therefore no right of action for any further sum.

The judgment of the Court below is reversed, and the suit is dismissed at the costs of the plaintiff.

ROSBOROUGH v. THE SHASTA RIVER CANAL CO.

THE president of a corporation, who is also a stockholder, is, in the absence of any usage of the company to the contrary, entitled to compensation for his services as president. If the rate is not fixed by special contract, he is entitled to what his services are reasonably worth.

An understanding, not amounting to an agreement, between a corporation and its president that he should receive pay for his services is competent evidence to rebut any presumption that he was serving gratuitously.

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The plaintiff acted for two yearly terms as president of the defendant, a corporation, with an understanding that he should be paid, but without any agreement to that effect, or as to the amount of compensation. Having been reelected, the trustees on the same day made an order as follows: "Ordered, that the compensation of the President of the Board of Trustees be established at fifty dollars per month;" and plaintiff continued to serve for two years longer: *held*, that the order was an agreement by the corporation to pay for plaintiff's past, as well as future services, at the rate of fifty dollars per month: *held*, further, that the order above mentioned was a contract in writing, within the meaning of the Statute of Limitations, to pay for plaintiff's past services, and that his demand therefor would not be bound by the statute until the expiration of four years from the date of the order.

Where an officer of a corporation is elected for a term of one year, with a compensation at a certain sum per month, the Statute of Limitations does not begin to run against any portion of his claim for salary until the end of the year.

APPEAL from the Ninth Judicial District.

The facts are stated in the opinion.

A. P. Crittenden, for Appellant.

I. As president of the company, the plaintiff was entitled to no compensation for his services, unless a salary was allowed him by some formal action of the Board of Trustees, and only for the time of such allowance. He was not a stranger, rendering service at the request of the corporation, and therefore entitled to claim compensation upon an agreement implied by law; but a trustee and stockholder, and in his capacity of president, attending to his own business, as well as that of other stockholders. The presumption that the service was to be gratuitous, necessarily results from the relation which, under the law, the trustees hold to the corporation. It is strictly fiduciary. All the corporate powers of the corporation are vested in them.

II. The Board could not lawfully pass a retrospective resolution, and vote away the money of the corporation to pay for services, for the payment of which the corporation was under no liability. No such power was in fact attempted to be exercised. The resolution does not purport to operate retrospectively, and it not being so explicitly expressed, it cannot so operate. (Smith's Com. Sec. 533, and cases cited.)

III. The Statute of Limitations is a bar to the recovery of any salary or claim for compensation accrued prior to the ninth of October, 1859 ; that is, more than two years next before the commencement of the action. (Act Lim. Sec. 17 ; Wood's Dig. 47.)

As to so much of the claim as is here objected to, certainly this action is one brought upon "a contract, obligation, or liability, not founded upon an instrument of writing." And certainly there is no writing in evidence "signed by the party to be charged," and which could be construed into an "acknowledgment or promise" constituting "sufficient evidence of a new or continuing contract whereby to take the case out of the operation of this statute." (Act of Lim., Sec. 31 ; Wood's Dig. 49.)

A resolution of the Board of Trustees is not a writing signed by the party to be charged, and could not, under any circumstances, operate to take a case out of the operation of the statute, though it might be original evidence to sustain an action for the salary allowed by it, at any time within four years after its passage. And this resolution, even if sufficient in form and signed by the corporation, is not evidence of any "lien or continuing contract," other than of a contract from the date of its adoption thereafter to pay the specified salary. It cannot be tortured into an acknowledgment that anything was then due the plaintiff.

H. O. Beatty, for Respondent.

I. There is no presumption that plaintiff's services previous to the order of the Board of Trustees were performed gratuitously, because he was a stockholder, or because he was acting in a fiduciary capacity. Attorneys act in a fiduciary capacity in collecting money ; yet ordinarily they at least expect to be paid a commission. Merchants, brokers, factors, executors, administrators, collecting agents, etc., all act in a fiduciary capacity ; yet, I believe, they ordinarily expect to be paid for their services. It is simply a question of interest, to be determined from the value of the services, the relation of the parties, and all the surrounding circumstances. In the absence of more direct evidence, it might be necessary or advisable to inquire, is it customary for corporations of this character to pay their presidents ? But here there is more

direct evidence of the intentions. The Court finds that it was always understood between the parties that he was to receive compensation therefor. But all this strictness of ruling as to the necessity of the seal, and resolution, etc., is dispensed with in modern practice. Corporations act usually by their Boards of Directors or Trustees in making contracts.

Under the general incorporation laws of California, the Board of Trustees is the proper body to make contracts for corporations. A majority of such Boards may contract, within the scope of their authority. It is not contended that they could not have contracted with the president for a salary; it is only contended they did not, because there is no record of such contract. Such record is not necessary. (See Angell & Ames on Corp. 282, 283.) Even if the unrecorded act of hiring were void (there is no modern decision holding such a doctrine), still the services being performed, and all the trustees (agents of the corporation) knowing it was with the intent to charge and receive compensation therefor, it would certainly be sufficient moral consideration to support a subsequent promise. And the satisfaction by resolution spread on the minutes and made of record of the former understanding or agreement would make the contract valid and binding. (See Angell & Ames on Corp. 290.) It is a legal presumption that the officers or agents of a corporation are to be paid. (Id. 309.)

II. With regard to the services performed after the eighth of November, 1859, there is no contest. Appellant admits this was performed under a contract, and not barred by the Statute of Limitations. With regard to the services performed between the thirteenth of October, 1858, and the eighth of November, 1859, my view of the case is this: He was elected in October, 1858, for one year, and until his successor was elected and qualified. There was an understanding that he was to be paid, but no specification as to the time, mode, manner, or amount of payment. That being the case, no right of action ever accrued until the end of the period for which he was elected. His time of service under that particular engagement expired certainly not earlier than the thirteenth of October, 1859. The suit was brought October 9th, 1861, clearly within two years. It hardly needs authority to show that when a

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party engages to serve for a specified time, and there is no special agreement as to the time of payment, he can only recover on a *quantum meruit*, after the entire service has been performed. With regard to the services between the seventeenth of April, 1857, and October 13th, 1858, a period of nearly eighteen months, the question is an entirely different one. The services during this period are barred by the Statute of Limitations, unless something has been done to take them out of the operation of that statute.

Up to the eighth of November, 1859, there was an understanding that the president was to be paid ; but how, when, and where, and how much, had never been determined. The president had served three terms ending respectively October 5th, 1857, October 13th, 1858, and November 8th, 1859. How much he was entitled to for these services was not determined. Had he brought suit, it could only have been on the *quantum meruit*. But on the eighth of November, 1859, this order was made : " Ordered, that the compensation of the President of the Board of Trustees be fixed at fifty dollars per month." This order, if made with the knowledge and assent (direct or implied) of the president, removed all uncertainty. He could no longer have maintained an action on the *quantum meruit*.

The preliminary facts being known, or admitted, no Court would allow him to prove his services were worth more than fifty dollars per month. This order, and the assent of plaintiff thereto, converted an open, unsettled account into an account stated. From that moment there was a new contract between the company and plaintiff that they should pay plaintiff for his past and future services at the rate of fifty dollars per month and no more. And from the date of this new contract only did the statute commence running. (Angell on Lim. Ch. 14, pp. 139-141.)

CROCKER, J. delivered the opinion of the Court—NORTON, J. concurring.

This is an action to recover for services rendered by the plaintiff as president of the Board of Trustees of the defendant, a corporation organized under the laws of this State. The plaintiff served in that capacity from the seventeenth day of April, 1857, to the

thirty-first day of January, 1862, having been elected from year to year for several terms. On the eighth day of November, 1859, the Board of Trustees of the company made the following order: "Ordered, that the compensation of the President of the Board of Trustees be established at fifty dollars per month." Previous to that time there was no order, resolution, or by-law, fixing his compensation. He brings this suit to recover for the whole period of time, both before and after the date of this order, at the rate of fifty dollars per month. The defendants, by their answer, denied generally all the allegations of the complaint, and set up the Statute of Limitations of two years to all the services rendered before the first day of October, 1859. The cause was tried by the Court, who found for the plaintiff for the whole time claimed, and judgment was rendered accordingly, from which the defendant appeals.

The first objection urged is that the plaintiff was entitled to no compensation whatever for the services rendered prior to the date of the order; that no rate of compensation having been before that time fixed by the Board of Trustees, it is to be presumed that he rendered the services gratuitously, being a stockholder of the company, and that the terms of the order do not include prior services. The Court found that his services were worth the sum of fifty dollars per month during the whole time, and that it was the understanding and expectation of the plaintiff and the Board of Trustees before the order was made, that he was to receive a compensation for his services.

The fact that the plaintiff was a stockholder of the company can make no difference as to his right to compensation. Stockholders, like all other persons laboring or rendering services for a corporation, are entitled to pay therefor; and, if there is no special contract, the law will presume an implied contract to pay what the labor or services are reasonably worth. It seems to have been the expectation of both parties in this case that the plaintiff was to be paid for his services, but the amount was not fixed until the date of the order. This understanding and expectation, although not sufficient, perhaps, to amount to an agreement, still removes all presumption that the services were performed gratuitously, if such a presumption is proper in such cases. (*Fraylor v. Sonora Mining*

Co., 17 Cal. 594.) It matters not, therefore, whether the order covers past services or not; the plaintiff is entitled to recover therefor upon an implied contract to pay what the services were worth, which the Court has found to be the same as fixed by the order.

But we think it clear that the order is sufficient as an agreement by the Board of Trustees to pay for the past as well as future services, at the rate of fifty dollars per month. Its terms do not limit it to future services. Even if the law would presume from the language used that it was the intention to apply only to the future, that presumption would be removed by the fact that it had previously been the understanding of both parties that he was to receive pay for past services. Such understanding, although not amounting to an agreement, is sufficient to remove a presumption of this kind.

The next error assigned is, that a portion of the claim—that is, for the services rendered prior to two years before the commencement of the action—is barred by the Statute of Limitations. The agreement for services in this case was of a continuous character. The plaintiff's term of office was yearly, and the statute would only commence running from the expiration of each year's term. (Angell on Lim. 112, Chap. 12, Sec. 6.) The suit was commenced October 9th, 1861, and his several terms of office prior to the order expired as follows: October 5th, 1857; October 13th, 1858, and November 8th, 1859—so that, independent of the order, he would be entitled to recover for services rendered from the thirteenth day of October, 1858; this would, however, bar the claim for services rendered from the commencement of his term of office, April 17th, 1857, to October 13th, 1858. We think it clear, however, that the order in this case is a contract in writing, within the Statute of Limitations, being, as we have shown, an agreement to pay for past as well as future services, and therefore the claim would not have been barred until after four years from the date of this order.

The judgment is affirmed.

Jansen v. McCahill and Wife.

JANSEN v. McCAHILL AND WIFE.

A CERTIFICATE to the acknowledgment of a conveyance by a married woman which states that she was made acquainted with the contents of the instrument, without stating that this was done by the certifying officer or any particular person, complies with the law and is valid.

The Notary who certifies to an acknowledgment is a competent witness to establish the due execution of the conveyance, against the denial of the person by whom his certificate states it to have been acknowledged.

A statement by an alleged grantor to the Notary who certified to the acknowledgment, that the signature is his, is good evidence of the execution, and may be proved by the officer.

Where the signature of the grantor is, at his request and in his immediate presence, affixed by a third person, it is as much the deed of the former as if signed by himself.

APPEAL from the Fifteenth Judicial District.

This is an action brought by C. J. Jansen against James McCahill and Ellen McCahill his wife, to foreclose a mortgage alleged to have been executed by defendants to secure a note made by James McCahill to Jansen, Bond & Co., and by them indorsed to plaintiff. The wife alone defended, alleging that the premises were at the date of the mortgage the homestead of herself and husband, and denying that she ever executed the mortgage.

Attached to the instrument was a certificate of acknowledgment by the wife, which was otherwise in proper form and stated, that "after being made acquainted with the contents of said instrument" she acknowledged, etc., without stating by whom she was made acquainted. Defendant objected to the introduction of the mortgage, on the ground that the acknowledgment was insufficient. Plaintiff then called the Notary who had certified to the acknowledgment, as a witness to prove its execution. Defendant objected to his competency, on the ground that he was interested to establish the genuineness of the signature and relieve himself from the consequences of his insufficient certificate, which objection was overruled, and she excepted. The evidence in regard to the execution was then given as stated in the opinion, upon which the Court admitted the instrument in evidence, and defendant excepted. Plaintiff had judgment, and defendant appeals.

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Jansen v. McCahill and Wife.

Brown & Graves, for Appellant.

I. The complaint is ambiguous, unintelligible, and uncertain, in this, that it alleges the making of a note payable to Jansen, Bond & Co., to secure the payment of which the mortgage is alleged to have been executed, but sets out a mortgage made to Charles J. Jansen to secure the payment of a note wherein the said Charles J. Jansen is alleged to be the payee.

II. The Court erred in admitting the mortgage in evidence.

The premises were the homestead of the defendants at the time of the alleged execution, and the same formalities attach to their conveyance as though the premises were the separate property of the wife.

By the twenty-second section of the act concerning conveyances, it is made necessary that the wife be made acquainted with the contents of the instrument. By whom? Of course, by the officer taking the acknowledgment. He must certify to the fact of her being made acquainted; and in order to do so, he must impart its contents to her. He certifies to his own act in this respect.

The acknowledgment being essential to the validity of the instrument as a mortgage upon the homestead, the defect in the certificate could not be cured by parol proof.

III. The Notary was incompetent to prove the execution. He was directly interested in establishing the regularity of his acts, as well as supplying any omission in the matter or form of the acknowledgment, as he would be liable to plaintiff for any loss resulting from his official neglect.

IV. The evidence was insufficient to show that Mrs. McCahill executed the mortgage.

Hereford & Williams, for Respondent.

CROCKER, J. delivered the opinion of the Court—COPE, C. J. concurring.

This is an action to foreclose a mortgage upon property claimed to be a homestead. The plaintiff recovered judgment, and the wife appeals. The wife demurred to the complaint, on the ground that it is unintelligible, ambiguous, and uncertain; the demurrer

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was overruled, and she assigns this as error. There is no foundation for the demurrer. The complaint is certain, intelligible, and clear of ambiguity in all its material allegations. It is objected that the certificate of the Notary Public, of the acknowledgment of the mortgage by the wife, is defective and insufficient, because it does not state that he, the officer, made her acquainted with the contents of the instrument. The certificate states as follows: "And the said Ellen McCahill, after being made acquainted with the contents of said instrument, acknowledged," etc. This is clearly sufficient. The statute does not require that the contents of the instrument shall be made known to the wife by the officer. It is sufficient if she is made acquainted with the contents by any person, that the officer knows that fact, and that it is duly certified to by him in the certificate of acknowledgment. It is also assigned as error that the Court erred in permitting the Notary to testify respecting the execution and acknowledgment of the mortgage. The wife filed an answer in which she denied that she signed the mortgage or executed it under her hand and seal, or that she acknowledged having signed it. We see no valid objection to the competency of this witness to testify upon the question of the execution of the mortgage and all that occurred at the time of its acknowledgment. As we have shown, the certificate of acknowledgment was sufficient, and needed no evidence to support it. It is also objected that the proof of the execution of the mortgage by the wife was insufficient. The Notary Public testified that he asked the wife if that was her signature, and she said it was, but he did not see her sign it. The defendant called her daughter as a witness, who testified that she wrote her mother's name to the mortgage in her presence and at her request. This evidence is clearly sufficient. The admission made by her to the Notary was good evidence that it was her signature. (2 Phillips' Ev., C. H. & E.'s Notes, 501.) The name of the wife being written by her daughter in her presence and at her request, made it as much her signature as though it had been written by herself. (*Ball v. Dunsterville*, 4 Term, 313; *Gardner v. Gardner*, 5 Cushing, 483; *King v. Longuor*, 4 Barn. & Ad. 647; *Frost v. Deering*, 21 Maine, 156.)

Judgment affirmed.

Bowen v. Aubrey.

BOWEN v. AUBREY *et al.*

UNDER our code of practice the same rules of pleading govern in all cases, both at law and in equity.

A complaint, whatever may be the character of relief sought, must state only issuable facts and not mere matters of evidence. Where this rule has been violated, a motion by defendant to strike out the irrelevant matter should be sustained.

Knowledge, by a sub-contractor upon a building, that there is an agreement in writing between the original contractor and the owner, is sufficient to put him upon inquiry as to the contents of the writing and charge him with notice thereof.

When the owner makes a contract for erecting or doing work upon a building, no sub-contractor or person furnishing labor or materials for the original contract can acquire any rights against the owner, in contravention of the terms and conditions of the original contract.

Where an original contractor sub-contracts work upon a building, there is no privity between the sub-contractors and the owner, and the latter cannot be made liable upon the sub-contract.

A party may, by agreement, waive a right created by statute for his benefit.

P. and others, contracted in writing with A., that the latter should erect a building for them, and in the agreement covenanted that he would not incumber or suffer to be incumbered the said building, or lot on which it is erected, by any mechanics' liens or debts of material, labor-men, contractors, sub-contractors, or otherwise." A. sublet the brick work to C., who had notice of the existence of the written agreement.

Held, that C. was precluded by the condition in the original contract from acquiring a mechanics' lien upon the building for the work done by him.

APPEAL from the Fifteenth Judicial District.

The facts are stated in the opinion.

C. E. Filkins, for Appellant.

I. The Court erred in overruling the motion to strike out a portion of the amended petition of Craft. (See Record, 24-28; *Green v. Palmer*, 15 Cal. 414.)

II. The said referee erred in his conclusions of law, that Craft was not bound by the provisions of the contract of Aubrey with appellants, as Craft's contract is subordinate to it, and is governed by its provisions. (*Doughty v. Devlin*, 1 E. D. Smith, N. Y. Com. Pleas, 641; *Nott on Liens*, 114, 118; *Linn v. O'Hara*,

1 Id. 560 ; 2 Id. 554, 558, 662, 698 ; *Benedict et al. v. Danbury Railroad*, 24 Conn. 320.)

H. K. Mitchell, for Respondent.

I. The petition of Craft, intervenor filed by leave of the Court, and as a right under the Statutes of 1858, 226, Sec. 7, is to be treated as a Bill in Equity against appellants. The petition or bill is sworn to.

The case of *Green v. Palmer* (15 Cal. 414), cited and relied upon by appellants, has no applicability to pleadings in equity. That action was at law to recover damages for the seizure and conversion of a bag of gold coin, and the rules there laid down were intended to govern pleadings in actions at law.

Cases in equity are frequent where the plaintiff, in order to obtain the relief asked for, sets forth in his bill the confessions, conversations, or admissions of the defendant, either written or oral, relying solely upon the examination of the defendant by his answer to establish the truth of such facts. And in the examination of a question whether an allegation or statement in a bill is relevant or pertinent, the Court will remember that a bill is not a pleading, simply stating the material allegations and charges upon which plaintiff's right to relief rests, but is also an examination of the defendants upon oath, for the purpose of obtaining evidence to establish the material averments. The plaintiff may, therefore, state any matter of evidence in the bill or any collateral fact, the admission of which by the defendant, may be material in establishing the general allegations of the bill as a pleading, or in ascertaining or determining the nature and the extent and the kind of relief, to which the plaintiff may be entitled consistently with the case made by the bill. (Story's Eq. Plead. 278, Sec. 268 ; *Hanby v. Wolverton*, 5 Paige, 523 ; 3 Id. Ch. 606.)

II. Even if Craft would otherwise have been bound by the contract between Aubrey and appellants, the acts and declarations of the latter were a waiver of the stipulation against a lien.

The case of *Benedict et als. v. Danbury Railroad* (24 Conn. 326), relied upon by appellants, is not in point. The Lien Law under which that lien was attempted to be enforced is widely dif-

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ferent from ours. It required the sub-contractor's contract to be in writing, and to be assented to in writing by the party for whom a building was erected, or no lien was created in favor of the sub-contractor.

Our statute expressly provides that he shall have a valid lien upon the property, upon his filing in the Recorder's office, etc.

The lien of a sub-contractor shall be a valid lien upon the property regardless of the claims of the contractor against the owners, provided the notice is given to the owners by the sub-contractor, etc. (Stat. of 1858, 225, Secs. 2, 3; 16 Cal. 126.)

CROCKER, J. delivered the opinion of the Court—COPE, C. J. and NORTON, J. concurring.

This is an action to enforce a mechanics' lien. The defendant Aubrey entered into a contract with Packard, Bayley & Simpkins, also defendants, to erect a building, known as the "Marysville Water Works," agreeing therein not to sublet any part of the work without the written permission of the latter. The contract also contained the following agreement on the part of Aubrey: "The said first party hereby agrees he will not incumber or suffer to be incumbered the said building or lot on which it is erected, by any mechanics' liens or debts of material, labor-men, contractors, sub-contractors, or otherwise." Aubrey sublet the brick work to the intervenor, Craft. No written permission for this sub-contract appears to have been given by Packard, Bayley & Simpkins, yet they seem to have recognized Craft as a sub-contractor. Bowen, the plaintiff, furnished to Aubrey materials for the construction of the building, and commenced this action to enforce a lien therefor. Craft, by leave of Court, filed his complaint of intervention, claiming a lien upon the property for the work done by him, as sub-contractor under Aubrey. The claim of Bowen was dismissed, and the action proceeded upon the claim of Craft alone. It was tried by a referee, who found in favor of Craft, and a judgment was rendered by which the premises were ordered to be sold, and the claim of Craft paid from the proceeds of the sale, with the costs of suit. A motion for a new trial was made and denied, and the defendants, Packard, Bayley & Simpkins, appealed from the judg-

ment and the order overruling the motion for a new trial, to this Court.

After the filing of an amended complaint of intervention by Craft, the appellants moved to strike out certain portions thereof which state that before he, Craft, signed the sub-contract with Aubrey, he procured a writing from Aubrey directing the appellants to reserve in their hands sufficient money to pay Craft the amount of his contract with Aubrey; that he took this paper to Packard, and then proceeds to detail conversations between himself and Packard, and that afterwards he closed the contract with Aubrey; that Packard and Simpkins had made certain assertions to different persons, and that one of the appellants had admitted certain facts to him within the last six months. The Court refused to strike out this portion of the amended complaint, and this is assigned as error. The Court below, in our judgment, erred in overruling the motion to strike out. The matter objected to is clearly irrelevant, and does not comport with any rule of good pleading. It is opposed to the rules laid down in the case of *Green v. Palmer* (15 Cal. 411). But the respondent claims that that case was an action at law, that the present one is in equity, therefore, the rules there laid down do not apply here; and that under the rules of equity pleading he had a right to set up matters merely of evidence in order to obtain the answer of the opposing parties to such facts, to be used against them on the trial. In other words, they claim the right to set up matters, usual in bills of discovery, under the old system of chancery practice. Under the code of practice we have but one system of rules respecting pleadings, which govern all cases, both at law and in equity. Those rules are clearly laid down in the Practice Act, and although, in construing that act, we resort to former adjudications, and the old and well-established principles of pleading, yet the former distinctions which existed between common law and equity pleadings no longer exist. The code has reduced all to one common system. In setting forth the facts of a case, which, under the old practice, would have been properly brought in a Court of Equity, they are generally stated in a mode similar to the statements in a bill in chancery, and to this there can be no objection so long as the principle of the code, which

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requires the facts to be stated in ordinary and concise language, is not violated. When the pleader goes beyond this, and attempts to introduce the peculiar formal allegations, many of which were mere fictions, found in the old forms of declarations in common law actions, or bills in equity, his pleading is liable to the objection of irrelevancy, and the objectionable matter should be stricken out on motion. In this case the pleader has attempted to obtain a "discovery under oath" by means of his pleading. This is forbidden by the four hundred and seventeenth section of the Practice Act, and the sections following it provide how such discovery can be obtained—that is, by examining the party as a witness. (*Easterly v. Bassignano*, 20 Cal. 489.)

It is also insisted that the Court below erred in rendering a judgment, giving the intervenor, Craft, a lien upon the property for the amount of his claim. The appellants, in their answer to the amended complaint of intervention, copy the contract between them and Aubrey in full, and then aver "of which contract the said Craft before and at the time he became such sub-contractor under said Aubrey, had notice." In his replication, Craft admits that he knew that Aubrey had agreed to erect the building for the appellants, but denies that he ever had "any notice of the conditions of the contract," or that he "had any knowledge that Aubrey had contracted not to sublet" without the written permission of the appellants. He does not deny but that he knew of the agreement in Aubrey's contract that no lien was to be filed on the premises. It is evident that Craft knew that there was a contract between Aubrey and the appellants, and that he was a sub-contractor under it. This was sufficient to put him upon inquiry, and he is to be considered as affected with notice of the contents and stipulations of the contract with Aubrey.

When an owner of property has contracted with another to erect a building or other superstructure, or do any other work, or furnish materials therefor, all sub-contractors and parties agreeing to furnish labor or materials to such original contractor do so with reference to such original contract, in subordination to its provisions and to the rights of the respective parties thereto, so far as they relate to the liability of the owner or the property, or so far as they rely

on such liability; and any agreement such parties may make with such original contractor is, so far as relates to the owner or the property, subject to all the terms, agreements, conditions, and stipulations of such original contract; and the owner or the property cannot be held liable or bound to any extent beyond the terms of the original contract, or such new or further contract as he may make with the original contractor or the sub-contractors. Any other rule would place the owner and his property completely at the mercy of the contractor; would give the contractor the power without any authority whatever, to make contracts binding the owner and his property. There is nothing in the relation of the parties which can, by any rule of law, vest in the contractor any such power. The owner cannot be held liable upon the contract between the original contractor and the sub-contractor, as there is no privity of contract between them. (Pierce on Am. R. R. Law, 387; *Doughty v. Devlin*, 1 E. D. Smith, 625; *Foster v. Paillon*, 2 Id. 556; *Grogan v. The Mayor, etc.*, 2 Id. 695; *Benedict v. The Danbury and Norfolk R. R.*, 24 Conn. 320.)

In the present case, Craft, as sub-contractor, has no higher rights than the original contractor. The original contractor, Aubrey, having by express agreement waived the right given him by the statute to file and enforce a lien upon the property, could not maintain an action to enforce any such lien. A party may always waive a right created by statute for his benefit, the same as any other. (*Tombs v. The Rochester and Syracuse Railroad Co.*, 18 Barb., S. C., 583; *Buel v. The Trustees of Lockport*, 3 Comstock, 197.) Aubrey having thus waived his right to a lien, his sub-contractor cannot claim any such right.

Several other questions are raised by the appellants, but it is not deemed necessary to notice them.

The judgment is reversed and the cause remanded.

Fairchild v. Amsbaugh.

FAIRCHILD v. AMSBAUGH *et al.*

IN an action to recover the price of personal property where one of two defendants makes default and the other answers denying the purchase, the defaulting defendant is not a competent witness for the plaintiff to show that his co-defendant was his partner, and as such jointly with him purchased the property.

APPEAL from the Fifth Judicial District.

The facts are stated in the opinion.

George W. Tyler, for Appellant.

I. The Court erred in allowing plaintiff to prove a partnership between defendants by McKinley, a co-defendant, who had made default.

The declarations of a copartner cannot be given in evidence to prove a partnership. (2 Greenl. Ev. 484; *Burque v. De Toslet*, 3 Stark. 53; *Jenkler v. Walpole*, 14 East, 226; *Whitney v. Ferris*, 10 Johns. 66; *Tuttle v. Cooper*, 5 Pick. 414; *Robbins v. Willard*, 6 Id. 464; *McPherson v. Rathbone*, 7 Wend. 216; *McCutchen v. Bankstom*, 2 Kelley, 244; *Grafton Bank v. Moore*, 13 N. H. 99; *Chase v. Stephens*, 19 Id. 465; *Allcott v. Strong*, 9 Cush. 523; 1 Greenl. Ev., Sec. 177, and cases cited.)

The same rule precisely must apply in regard to his evidence when placed upon the stand as a witness.

It is only after the fact of partnership is established to the satisfaction of the Judge by proof, *aliunde*, that the admission of one is received so as to affect the other.

McKinley had made default, and judgment could be entered against him at any time by the plaintiff for the full amount claimed in the complaint. He was therefore directly interested in making appellant, his partner in the purchase, partner, as in that case appellant would be liable for a moiety of the judgment. (*Washburn v. Alden*, 5 Cal. 463; *Easterly v. Bassignano*, 20 Id. 489.)

II. The Court erred in ruling that payment could not be given in evidence under the pleadings.

Whatever doubt there might be as to the right of defendants to give payment in evidence under the general issue, where the dec-

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laration is in assumpsit (and I believe this Court has never passed upon that question), there is none as to his right so to do, where the declaration is in debt, as it is in this case, and not upon a specialty, or a record.

The common consolidated count in debt, is as follows: "For that the said (defendant) on ——— was indebted to the plaintiff in ——— dollars for [here state what the debt is for as in assumpsit]," etc., which is the exact form of the complaint in this case. (2 Greenl. Ev., Secs. 280, 281, 281a; *Bloomfield v. Smith*, 1 M. & W. 542; 2 Saunders, 187a, Note (21 by Williams.)

The only doubt as to whether payment might be given in evidence, even in assumpsit, seems to be where the declaration is upon an express contract, and the reason for the exclusion of evidence of payment seems to be, that it would take the plaintiff by surprise.

I find no conflict in the authorities upon the proposition, that payment may be given in evidence under the general issue where the declaration is in debt. They all agree that it may, unless the action is founded upon a specialty, or upon a record.

III. The Court erred in refusing defendant permission to amend his answer.

It was a gross abuse of the discretion of the Court, to refuse permission to defendant to amend his answer. (*Connolly v. Peck*, 8 Cal. 75; *Barth v. Walther*, 4 Duer, 228; *Pollock v. Hunt*, 2 Cal. 193; *Cook v. Spears*, Id. 209; Civil Prac. Act, Sec. 68.)

S. A. Booker, for Respondent.

CROCKER, J. delivered the opinion of the Court—COPE, C. J. concurring.

This is an action to recover for personal property sold and delivered by the plaintiff to the defendants. The defendant Amsbaugh appeared and filed an answer denying the allegations of the complaint. The summons was duly served upon McKinley, the other defendant, but he failed to answer. A jury trial was had, and the following verdict was rendered: "We, the jury, find for the plaintiff four hundred and fifty dollars," and thereupon a judgment was entered in favor of the plaintiff, against the defendant Amsbaugh,

for that sum, and costs. Amsbaugh moved for a new trial, which was denied, and he takes this appeal from the judgment and the order refusing the new trial.

At the trial the plaintiff called the defendant McKinley, as a witness, to prove that himself and Amsbaugh were partners, and as such purchased the property sued for, to which the defendant Amsbaugh objected that the witness was not admissible to prove those facts, being interested, but the Court overruled the objection, and allowed him to testify, and Amsbaugh excepted, and this ruling of the Court is one of the grounds of error assigned by the appellant.

In the case of *Washburn v. Alden*, (5 Cal. 463) it was held, that a defendant who has suffered default is not a competent witness to prove that he was authorized by his co-defendants to sign his name to a note, as by so doing he would reduce the amount of judgment against himself. (See also, *Easterly vs. Bassignano*, 20 Cal. 489.) So in the present case, McKinley was not competent to prove that Amsbaugh was a partner in the purchase of the property, because he would thereby cast a part of the burden of the debt from himself upon his co-defendant. He would thus gain "by the direct legal operation and effect of the judgment," and therefore comes clearly within the provisions of Sec. 398 of the Practice Act. He would be a competent witness to prove that his co-defendant was not his partner; for this, in a legal point of view, would be against his interest. (*Sparks v. Kohler*, 3 Cal. 299.)

Upon the cross-examination of McKinley, he testified that the debt sued for had been paid and satisfied. The plaintiff objected to this evidence, and also to the evidence of Amsbaugh, who was examined under notice upon the same point, that it was not admissible, as the defendant had not plead the same in his answer. The Court allowed McKinley's evidence on that point, but excluded that of Amsbaugh. The defendant then asked leave to amend his answer to set up the plea of payment, which was refused by the Court, and to which he excepted. The exclusion of this evidence and the refusal to allow defendant to amend his answer are also assigned as error. The evidence must be confined to the matters put in issue by the pleadings; but it has been held by this Court,

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in *Frish v. Caler* (21 Cal. 71), that a plea of payment is not new matter, and it follows, that it was not necessary to set it up as a special defense in the answer. The evidence was therefore admissible under the general denials of the answer, and the Court therefore erred in excluding it.

The judgment is reversed, and the cause is remanded for further proceedings.

BAYLES *et al.* v. BAXTER.

WHERE one person pays the consideration money for the purchase of land and the conveyance is made to another, the latter holds the title in trust for the person paying the consideration.

The fact that the party receiving a conveyance of land verbally agreed at the time with the person paying the consideration, that the former should, upon demand, execute a conveyance to the latter of the premises, does not make the trust *express* as distinguished from one implied by law from the act of the parties, so as to exclude proof of it by parol under the operation of the Statute of Frauds.

Whether the sixth section of the Statute of Frauds does not apply alone to the sale of lands as between grantor and grantee, and not to contracts for the purchase of land by one person for the benefit of another—*Query*.

A resulting trust may be defeated as well as established by parol evidence.

APPEAL from the Seventeenth Judicial District.

The Court below found the facts as follows: In a conversation about the tenth day of August, A.D. 1861, between the plaintiffs and defendant, both being at the time owners in the mining claims and property of the Highland Masonic Mining Co. at Wet Ravine, in Sierra County, defendant stated to plaintiffs that he had made arrangements to buy an interest in the company from one John Thomas, but would not do so unless the plaintiffs would also purchase an interest, so that they might have a majority of interests in the company, in order that the mining claims of the company might be worked and managed in accordance with the views and wishes of plaintiffs and defendant. Whereupon the plaintiffs stated their readiness to purchase an interest for the purposes named, and requested defendant to ascertain what interest they could purchase.

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It was agreed that plaintiffs should furnish the money, that the defendant should buy the claim for them, but should act as if purchasing for himself, as it was supposed that he could buy it cheaper than plaintiffs—they having been active in some dispute or trouble in the company as to the manner of working the claims; that he should take a deed in his own name, and hold the interest until the October meeting of the company, and at that meeting should attend and vote with them (*i. e.* as they wished) and should at any time after said meeting, when it might be demanded of him, make a transfer or conveyance of the interest to them. A few days afterwards defendant informed plaintiffs that he had arranged to buy an interest, one undivided thirty-second of the mining claims and property of the said Highland and Masonic Co., of John Cowen, for the sum of \$1,600; to which sum plaintiffs assented and handed defendant fifty dollars, which he said was wanted to "bind the bargain," he informing them that they could have a few days' time to raise the balance of the purchase money, and they agreeing to raise it.

On the seventeenth day of August, A.D. 1861, the plaintiffs at Wet Ravine gave defendant the balance and ten dollars over (in all \$1,610)—\$1,600 to be paid to John Cowen for his interest, and ten dollars for expense of deed and defendant's incidental expenses to Forest City, where the said Cowen was, to complete the purchase. The purchase was to be made, according to previous understanding of the parties, for plaintiffs, but in the name of defendant. On the day last named defendant purchased the interest from John Cowen, which is designated as share or interest No. 3, consisting of an undivided thirty-second of the mining claims, etc., as aforesaid, paying therefor \$1,600 of the money obtained from plaintiffs, and taking a deed in his own name. Since the month of October, 1861, plaintiffs have demanded of defendant a deed of the premises, with which demand he has failed to comply.

Vanclief & Bowers, for Appellant.

We admit that the bare payment of the purchase money by one party, where the title is conveyed to another, will raise a resulting trust in favor of the party paying the money, even though nothing

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of the kind was intended by the parties, and even contrary to the intention of the trustee. But we hold that where the parties have deliberately entered into a special verbal contract, which fully and completely provides for the creation of the trust with all its qualifications and conditions, as in this case, such special contract cuts off and prevents any resulting trust. In this we think the authorities fully sustain us. (Browne on Frauds, Sec. 92; Sugden on Vendors, 441; Hill on Trustees, 98; 5 Paige's Ch. 117; 6 Cal. 153; 9 Id. 655; Dart on Vendors, 435, 436; *Bellasis v. Compton*, 2 Vern. 294.) The special contract set out in the complaint cuts off any trust which might otherwise have resulted from the payment of the purchase money. The complaint has placed the right of plaintiffs on the special contract creating a trust (if at all) which has qualities that must depend on contract and could not be implied. Defendant was to hold the property and act as the owner of it for a length of time for a consideration in addition to the purchase money. Suppose this agreement had been in writing, and plaintiffs had brought this suit before the first Sunday in October, and without demand, could not the defendant have defeated them by pleading the contract? If so, then plaintiffs' rights depended on the special contract, and did not result from payment of the purchase money.

Searls & Niles, for Respondent.

Where, as in this case, the purchase money is advanced by one and the deed taken in the name of another, the grantees will be adjudged to hold in trust for the man advancing the purchase money. (Story's Eq. Juris. Sec. 1201; 2 Johns. Ch. 406; 1 Id. 582; 1 Greenl. Ev. 266; Willard on Trustees, 600; 4 Kent's Com. 305; Hill on Trustees, 140.)

It is contended that where there is a parol agreement to purchase land in the name of B with the money of A, it creates an "express trust," and was therefore void under the Statute of Frauds. In reply, we say the whole doctrine of implied trusts in this class of cases rests upon the presumption that there was just such a parol agreement or arrangement between the parties. (2 Story's Eq. Juris. 1201.) Can this implication be rebutted by

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showing that defendant did in fact agree to do exactly what the law will presume he did in the absence of any proof. (See *Hidden v. Jordan*, 21 Cal. 92.)

CROCKER, J. delivered the opinion of the Court—COPE, C. J. concurring.

This is an action to compel the defendant to convey to the plaintiffs the undivided one-thirty-second part of the mining claims and property of the Highland and Masonic Mining Company. The findings of the Court show, that on the seventeenth day of August, 1861, the plaintiffs furnished the defendant \$1,610 to purchase said interest and pay the incidental expenses of the purchase, with the agreement that he was to make the purchase and take the conveyance of the property in his own name and hold it until the October meeting of the company, which he was to attend and vote this interest as the plaintiffs might direct; and that after that meeting he should at any time upon demand convey the property to the plaintiffs. The reason of this agreement was that it was supposed that the defendant could buy the property cheaper than the plaintiffs. The defendant made the purchase accordingly with the money, and after the October meeting they demanded a conveyance, which he refused to make. On these facts the Court below found for the plaintiffs, and rendered judgment that the defendant convey the legal title to said interest by a good and sufficient deed of conveyance to the plaintiffs, within thirty days from the entry of the decree, and in default thereof that S. B. Davidson, who was appointed a commissioner for that purpose, make, execute, and deliver the same, and for the costs of the plaintiffs. From this judgment the defendant appeals.

The law is well settled, that where one person pays the consideration money for the purchase of land, and the conveyance is made to another, the latter holds the title in trust for the person who pays the consideration. (2 Story's Eq. Sec. 1201; *Hidden v. Jordan*, 21 Cal. 99; *Simson v. Eckstein*, *supra*, 580; *Osborne v. Endicott*, 6 Id. 153; *Wells v. Robinson*, 13 Id. 141.)

But the appellant contends that there being a special agreement between the parties, this constitutes an *express* trust, as contradis-

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tinguished from the *implied or resulting* trust, which arises by implication from the payment of the consideration money; and that such *express* trust is within the Statute of Frauds, and could not be proved by parol evidence, as was done in this case. Sec. 6 of the Statute of Frauds (Wood's Dig. 106) provides, that no estate, interest, or *trust* in lands shall be created, granted, or assigned, *unless by act or operation of law*, or by deed or conveyance in writing; and Sec. 7 provides, that Sec. 6 shall not be construed to prevent any trust from arising or being extinguished by operation of law. The trust in this case arises purely by operation of law, and results from the acts and agreements of the parties. In such cases the trust need not be created by writing, or proved by written evidence, for it comes clearly within the exception of the statute. There was no agreement, in terms, that the defendant should hold the property in trust for the plaintiffs, which would seem to be necessary to create an *express* trust; but from the facts that the purchase was made with the money of the plaintiffs, and the conveyance made to the defendant, the law implies that the title thus conveyed is held in trust for the person furnishing the money, and thus the trust is created by operation of law. The fact that the defendant agreed by parol to do what the law would compel him to do—that is, hold the title subject to the rights of the plaintiffs, and convey to them upon demand after a certain time, makes the trust none the less a trust created by operation of law. Indeed, it is a question whether the statute does not apply alone to the sale of lands, as between grantor and grantee, and not to contracts like this for the purchase of land by one person for the benefit of another. The law is well settled that in cases like the present the trust can be proved by parol evidence. (*Tiffany & Bullard's Trusts and Trustees*, 189–192, 486–489; *Soggins v. Heard*, 31 Miss. 426; *Pritchard v. Wallace*, 4 Sneed, 405; *Osborne v. Endicott*, 6 Cal. 149; *Russ v. Mebius*, 16 Id. 356; *Lockwood v. Caulfield*, 20 Id. 126; *Hidden v. Jordan*, 21 Id. 99.) The cases referred to by the appellant do not conflict with this principle. In *Leggett v. Dubois* (5 Paige, 117) the Court say: "A resulting trust is the mere creature of equity, as a resulting use is of law; and it cannot therefore arise where there is an express trust declared by the

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parties, and evidenced by a written declaration of such express trust." In *Bellasis v. Compton* (2 Vern. 294) the decision, substantially is, that a resulting trust may be proved by parol and also defeated by parol proof of an agreement to a different trust from that which would be implied by law; in other words, it sustains the well established principle that a resulting trust may be defeated as well as established by parol evidence. In *Leman v. Whitley* (4 Russell, 423) the circumstances are entirely different from the present, as it was an attempt by a grantor to show by parol evidence that his deed, absolute in form, was intended to be in trust for certain purposes, and does not, therefore, apply to the case before us.

The judgment is affirmed.

SIMSON v. ECKSTEIN.

To establish title under a deed executed in pursuance of a power authorizing a sale upon notice, as a general rule the giving of the required notice must be proved, and will not be presumed from the execution of the deed.

From lapse of time and acquiescence in the possession of the purchaser the regularity of a sale under a power may be inferred, and a presumption indulged that due notice thereof as required by the power was given.

A recital of a material fact in a deed is binding and conclusive upon the party reciting it, and all claiming under him as privies. This rule applies to a recital of the facts that a notice of sale, essential to the validity of the deed, was duly given.

A recital in a deed executed by a mortgagee in pursuance of a power of sale conferred upon him in the mortgage, binds the mortgagor equally as if the deed were executed by him in person.

Where a deed executed in pursuance of a power is on record and the purchaser in possession, a subsequent grantee of the donor takes with notice, and is bound by a recital of fact in the deed of the donee.

In ejectment the defendant may recover by showing an outstanding superior title in a stranger, without connecting himself with it.

Where the purchase money for land is paid by a person other than the grantee in the conveyance, the former is the real purchaser, and the grantee holds the legal title in trust for him.

Acceptance by the mortgagor of the proceeds of a sale made under a power contained in the mortgage, is a waiver by him of all objections to the sale, and a ratification of the acts of the mortgagee—the donee of the power—in relation to the sale and conveyance, which estops him from contesting their validity.

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Actual adverse and undisturbed possession of land for a period exceeding the time prescribed by statute for the enforcement of a right of entry, gives to the possessor a right of undisturbed enjoyment equivalent to a perfect title.

In 1853 the defendant took possession of the city lot in controversy under a deed purporting to convey to him the title in fee, in pursuance of a power of sale contained in a mortgage made in 1850, and in good faith, believing himself to be the owner, and claiming so to be against all the world, has since retained actual, manifest possession of the premises. In 1858 the mortgagor executed a deed of the lot to the plaintiff, upon which he relies for a recovery in the present action of ejectment: *held*, that upon his possession alone, without reference to the validity of his title under the deed, the defendant must recover.

APPEAL from the Twelfth Judicial District.

The facts are stated in the opinion of the Court.

Shafter & Heydenfeldt, for Appellant.

I. Under the decisions, it is a matter of indifference, so far as the rights of the purchaser are concerned, whether the notice of sale was given or not. (*Hayden v. Dunlap*, 3 Bibb, 216; *Smith v. Randall*, 6 Cal. 50.)

No rule should be enforced where the sale is under a power voluntarily conferred by the mortgagor, less liberal than the one adopted where the power is conferred on a Sheriff or master, *in invitum*. If Ellis sold without first giving notice, an action would lie against him at the suit of Sprague to recover any damages which he may have sustained.

II. Should the Court consider that it was necessary for the defendant to prove an exact compliance with the terms of the power in the matter of the notice, then we insist that the point was proved *prima facie*.

1. It was proved directly by the admissions made by Ellis in the deed to Eckstein.

Ellis was made the attorney and agent of Sprague by the power contained in the mortgage. The agency comprehended the act of sale, the steps antecedent to it, and the giving of a deed to the highest bidder, containing all the customary and necessary recitals. The power established between Sprague and Ellis the relation of principal and agent, and the agency extended to and directly involved all the matters above adverted to. In performing the last

act comprehended in his agency, Ellis states what he had previously done in the conduct of the particular business intrusted to him, and therein recites the notice which his letter of attorney required him to give. All these matters are obviously *res gestae*—"performed during the continuance of the agency, and in regard to a transaction then depending—*et dum fervet opus*." (1 Greenl. Ev., Secs. 113, 114; Story's Agency, Secs. 139, 452.)

These admissions or recitals of Ellis are virtually the admissions of Sprague, the principal of Ellis, and under a familiar rule of law they bind the plaintiff, a grantee of Sprague by a subsequent deed, if the plaintiff took with notice of the prior deed to Eckstein. (1 Greenl. Ev., Secs. 189, 190; *State v. Catlin*, 3 Vt. 530; *Denton v. Perry*, 5 Id. 382; *Williams v. Shackleford*, 18 Ala. 318.)

In *Gray v. Gardner* (3 Mass. 400), it was ruled at the trial, that the recitals in an administrator's deed were evidence tending to prove that the notice required by law had been given.

In *Bell, Admin'r of Porter v. Barnes* (14 Vt. 307), it was held, that a recital in a deed that the grantors were the heirs at law of a certain person deceased, was, in itself, evidence of the fact, but more particularly so when aided by the presumption arising from long possession. And it is to be remarked, that in that case there was no privity whatever between the parties making the recital and the parties sought to be affected by it.

2. That the required public notice was in fact given, is to be presumed.

First, from the recitals, the lapse of time, coupled with the fact of a continuous and adverse possession of eight years on the part of Eckstein, under the very deed in controversy—manifested of record—by expensive improvements and the annual payment of taxes. To this may be added the acquiescence of Sprague, manifested by his omission to sue, mortgage, lease, convey, or interfere by word or deed, for a period of eight years.

Where a party deduces his title under a special authority, and some of the steps contemplated in the power have been proved, and the grantee has been in possession for a long time, it may be presumed by the jury, and should be presumed by them that all the other steps were taken. (*Pejepscot Proprietors v. Rearsom*, 14

Mass. 144; see, also, *Winthrop Gray v. James Gardner*, 3 Mass. 398; *Read v. Goodyear*, 17 S. & R. 350; *Freeman et al. v. Thayer*, 33 Maine, 76; *Bergen v. Bennett*, 1 Caines' Cases in Error, 1 Matthews' Presumptive Ev., 194, 197, 199, 202, 203, 205, 220, 273-275, 277, 278, 37, 41-43.)

The case at bar fully ascertains all the conditions of fact upon which the rule proceeds. It is not necessary that the lapse of time should be measured by twenty years, except in those cases where there is no fact except the lapse of time upon which the presumption can be raised, as in the case cited from 33 Maine, 76. But where, with the lapse of time, we have the further fact of adverse claim and occupation, and of uncomplaining, torpid acquiescence, on the part of him who is interested to challenge that occupation, if he has any legal right to do it, a much shorter period than twenty years will suffice.

In the case cited from 17 S. & R. 350, the possession under the tax deed was only of ten years' duration.

In *Attorney-General v. Bowyer*, 3 Ves. 714; 5 Id. 303; 8 Id. 273, cited in Matthews' Pres. Ev. 197: "From time, coupled with other circumstances, a conveyance or release of an equity of redemption was presumed, so as to impress upon the mortgaged premises (which were in the mortgagee's possession) the character of his absolute property, and to bring it within the operation of a will made by the mortgagee, about eight years after a clear recognition of a subsisting interest in the mortgagor."

In the case of *Leents v. A. & W. Crispe* (3 Bro. Par. Cases, 111,) a rule to redeem was refused after the mortgagor's acquiescence for six years under a foreclosure by his own consent. The case is cited with approbation in 1 Caines' Cases in Error, 21.

Where "time" stands alone, unaided by corroborative facts, there may be a propriety in fixing the period by an arbitrary limit. The maxim, *ex diuturnitate temporis, et cet.*, proceeds upon a case of this degree of meagerness. But when with "time," we have an open and hostile possession, coupled with an acquiescence that utters no word and makes no sign, then "time" may very well be shortened in view of the weight of the facts with which it is allied. The rule that tolerates the introduction of these presumptions is not

an arbitrary one. It does not force the understanding, but obeys it; and the clear behest of the understanding is, that time may be abridged when the facts before alluded to are found, without weakening the natural force of the presumption. It is not unworthy of consideration, that periods short by English and eastern measurement are relatively long periods here. See *Green et al. v. Coville* (10 Cal. 317), in which a question of "time" is discussed, in connection with California necessities and tests.

III. But the deed made by Ellis to Eckstein, as the attorney of Sprague, has been ratified by Sprague.

The deed is sufficient upon its face, and the existence of the power is proved. If no power, written and sealed, had been produced, there might be a question, perhaps, as to whether Sprague could ratify effectually, except by deed. But as the papers are complete, and as the alleged defect is a matter lying in averment, a ratification by Sprague may be proved *in pais*.

A ratification by him will be argued on two grounds, complexly different, but substantially the same:

1. By his passive acquiescence in the sale, and in the open and notorious exercise of the rights, for eight years, which Eckstein supposed he had acquired under it.

We deem it unnecessary to collect and exhibit the cases bearing upon the point now under discussion. The doctrine is at once stated and illustrated in *Matthews on Presumptive Evidence*, 277.

"The confirmation of a deed by a third person, or his consent to it, is likewise presumed after long, unmolested enjoyment. Thus, if a parson conveys away a part of his glebe, the conveyance, after a great lapse of time, with possession under it, will be taken to have been confirmed, as the law requires, by the patron and ordinary." (*Mat. Pre. Ev.* 277.)

2. But Sprague signified his acquiescence in the sale and deed, in a manner still more significant and decisive. The purchase money paid in by Eckstein was applied on the mortgage debt, and with Sprague's knowledge, and by a piece of positive conduct on his part he thereafter claimed and had the benefit of it.

The record proves, as against Sprague, that he knew of the mortgage sale in question, and that he claimed and received the benefit

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of the money paid in by the defendant. The offer of judgment itself, when read in the light of the *res gestæ*, contains a written recognition and ratification of the sale. (*Blood v. Goodrich et al.*, 9 Wend. 525; *Whitney v. Sprague*, 2 Pick. 198; Story's Agency, Secs. 252-260; *Wright v. Whitehead et al.*, 14 Vt. 268; *Treevers v. Creeve*, Cal. Jan. Term 1860; *Holland v. City of San Francisco*, 7 Cal. 361; *Qui sentit commodum*, etc., Brown's Maxims, 449.)

IV. Simson is in no better position than Sprague would be, were he plaintiff, for Simson bought with notice in fact. (*Hunter v. Watson*, 12 Cal. 363; *Smith v. Dall*, 13 Id. 510.)

E. W. F. Sloan, for Respondent.

I. In case of sale under a power, "the regularity of the sale is to be made out as a part of the purchaser's title, and if irregular, he takes nothing by his deed." (*Jackson ex dem. Rogers v. Clark*, 7 Johns. 226.)

No title passes, unless all the essential requisites of the power are complied with. If the power authorizes a sale of the whole land, or such part as may suffice to discharge the installments then due, a sale for the payment of installments due and to become due, is void. (*Ormsby v. Larascon*, 3 Litt. 404.)

There may be cases in which a conveyance by trustee, attended with some irregularity, will not be considered as void in law. The entire legal estate being in the trustee, his deed may be sufficient to transfer that estate to another; and whilst circumstances might induce a Court of Equity to set it aside, or enforce the trust against the vendee, yet the deed might be regarded as good in law to pass the estate. But it is not every conveyance made by a trustee that will be upheld in law; and generally a special authority must be pursued. (*Denning v. Smith*, 3 J. Ch. 344; *Berger v. Duff*, 4 Id. 369; *Sherman v. Dodge*, 6 Id. 110.)

In the case at bar, the mortgagee in attempting to convey the entire estate in extinguishment of the mortgage, if it may be so called, acts under a mere power, and must have complied with all that is required by the terms of the instrument creating that power, in order to render the conveyance legally operative.

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1. There is no proof that the sale was made by or under the immediate superintendence of the mortgagee, or that ten days' public notice had been given.

The deed from Ellis to T. Sprague contains a recital to the effect that notice of the sale had been published ten days in the *Alta California*, but there is no proof of the fact. There is another recital which is demonstrably untrue in the same instrument. The recitals, however, are not evidence upon the objection under discussion. It is not even pretended on the other side, that there is any direct evidence of the publication of notice.

2. The propriety of allowing a mortgagee, who is himself the creditor, to execute the power of sale has, upon general principles, been often doubted, and, in some cases, expressly denied. (*Ford v. Russell*, 1 Freem. Ch. 42.)

The provisions of the Act of 1850, Chap. 142, Secs. 109–111, seem to constitute a decided inhibition against the execution of the power of sale except through the interposition of the Court.

Be that as it may, however, the mortgagee cannot delegate the power to another. The power being coupled with an interest, may be so far regarded a power appendant as to pass by an assignment of the mortgage (*Jenks v. Alexander*, 11 Paige, 619), but the mortgagee cannot commit its execution to another person, unless the right of substitution is expressly given. (*Berger v. Duff*, 4 J. Ch. 367; *Heyer v. Deaves*, 2 Id. 164.)

II. The recitals in a deed given by the attorney cannot be received as evidence against the principal, upon any general principle or rule of law. Deeds made by public officers and containing certain recitals are, by statute, sometimes made *prima facie* evidence of the facts recited; but all such statutes are in derogation of the common law, and are limited in their application to the cases therein expressly named.

Where the attorney has a discretion to sell and convey in what manner he pleases, a purchaser in good faith has nothing to do but pay the purchase money and take his deed. So, where his instructions as to the mode of procedure are secret. But where the manner, terms, and conditions of the sale are all distinctly set forth in the written letter of attorney, the purchaser is bound at his peril

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to see that there has been a compliance, and to prove the fact whenever he claims title under it.

To say that the deed itself is *prima facie* evidence of the performance of all antecedent steps on the part of the attorney in fact, would be a denial of the rule of law which imposes upon the party setting it up the burden of proof.

The time which has elapsed since the date of the conveyance in question can have no material bearing on the point under discussion, except so far as it may have occasioned the loss or destruction of the highest evidence of the facts sought to be established.

In *Gray v. Gardner* (3 Mass. 398) and *Pejepscot Proprietors v. Ransom* (14 Id. 145), all sources of proof had been exhausted. In the former, the sale had been made by an administrator under the order of a Court, and subject to its supervision and sanction. In the latter, it was made by a municipal officer in the discharge of his official duty, and the vendee had been in possession of the deed, and of the land to which it related, for more than thirty years.

The case at bar is clearly distinguishable from either of those.

In cases of conclusive presumption the rule of law merely attaches itself to the circumstances when proved, and is not deduced from them. It is not a rule of inference from testimony, but a rule of protection. (1 Greenl. Ev. Sec. 32.) Of course, the rule in that class of presumptions does not apply here; for, if it did, the final act of the agent in giving the deed would be conclusive as to the performance of all precedent conditions.

III. It is said that the deed from Ellis to Isaac Eckstein has been ratified; 1st, by long acquiescence; and 2d, by receipt of the purchase money.

The argument on the first ground loses its force when we come to notice the fact, that the appellant is not connected by any derivative conveyance with the deed from Ellis to Isaac Eckstein. There is no proof that he entered or holds under it. For aught that appears, his possession is adverse to both Isaac Eckstein and respondent.

As to the second ground, there is no evidence that Sprague claimed any reduction of the demand, except what is disclosed by the judgment roll in *Ellis v. Sprague & McDougall*.

In that action, Sprague seems to have offered to allow judgment to be taken for the sum of \$3,220, with interest from the twentieth of March, 1851.

There is nothing to connect that offer with the alleged sale on the twentieth day of March, 1851, except the mere coincidence that interest was to run from the same day. That circumstance is more than overcome by the great discrepancy between the rate of reduction and the avails of the sale; and hence, what counsel denominates "strong and conclusive presumption," is sought to be fortified by conjecture.

If the offer of Sprague had any reference whatever to the circumstances of that sale, it must have been well understood by Ellis who accepted the offer; the appellant, therefore, had the opportunity of proving the fact directly, by interrogating Ellis on the point. It can hardly be possible that Sprague could have done any act, in 1853, by which he intended to recognize the validity of the sale referred to, when, in fact, the mortgage had been released of record long before. This, it will be remembered, appears from the appellant's own evidence, without any attempt to weaken its effect, or to explain it in any way.

IV. It is said that Simson is in no better position than Sprague.

That is not necessarily so. He may be properly chargeable with notice of what was duly recorded. But the mere fact that the appellant was in possession (if such was the fact) at the time of Simson's purchase, was no notice to him of the rights of Isaac Eckstein in that lot, however acquired.

The doctrine of *Hunter v. Watson* is, "that the open, notorious possession of real estate, by one having an unrecorded deed for it, is evidence of notice to a subsequent purchaser, of the first vendee's title." The principle seems to be, that the fact of possession directs or suggests inquiries on the part of the intended purchaser, touching the right of the actual possessor. But it does not extend to the title of a stranger. Possession by a lessee has been held to be no notice of his title of the lessor; and *a fortiori*, it cannot be of title in a third person with whom there is no privity.

The whole defense consists of an attempt to establish an outstanding legal title in opposition to the title of the respondent. Of

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course, such defense can be made. It is sufficient to show that the right of entry is not in the plaintiff in ejectment. But after he has once made a case by proof of a title in himself, in order to defend the possession by proof of title in another, it must be such a title as would enable that other to recover the possession as against the plaintiff.

CROCKER, J. delivered the opinion of the Court—COPE, C. J. concurring in the judgment.

This is an action to recover possession of one hundred vara lot No. 210, in the City of San Francisco. Both parties claim title under one Sprague, who, on the twenty-sixth day of November, 1850, mortgaged the lot, with several others, to Ellis, to secure a promissory note for \$4,000, with interest at five per cent. per month, and due February 26th, 1851. The mortgagor, by the terms of the mortgage, appointed Ellis his attorney in fact, to sell the property, in case of the non-payment of the note, at public auction, after giving ten days' public notice of the sale, and as such attorney, to execute and deliver to the purchasers good and sufficient deeds of conveyance therefor. In pursuance of this authority, Ellis, on the twentieth day of March, 1851, caused the lot in question to be sold, by a firm of auctioneers in the City of San Francisco, at public auction, to Isaac Eckstein, for one hundred and sixty-five dollars, and in pursuance of the sale, he, as the attorney in fact of Sprague, and in the name of the latter, executed, acknowledged, and delivered to the purchaser a deed for the lot, which was duly recorded on the twenty-ninth day of March, 1851. This deed, among other things, recites that the sale had been advertised for ten full days in the *Alta California*, a paper published in the city. The mortgage appears to have been twice canceled on the record, one being dated April 7th, and the other April 12th, 1851. This is the title under which the defendant claims. The plaintiff claims under a deed executed to him by Sprague, bearing date the twenty-first day of April, 1858. The case was tried by the Court, who rendered a judgment for the plaintiff, from which, and from an order refusing a new trial, the defendant appeals.

The evidence shows, in addition to the foregoing facts, that the

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defendant, Solomon Eckstein, bid in the lot at the sale, paid the purchase money, and took the deed which was delivered to him. The defendant fenced in the lot in 1853, has occupied it ever since, graded it three or four years before the trial, and has paid the taxes on it. On the fourth day of February, 1853, Ellis commenced an action to recover the amount due on the promissory note against Sprague, and one McDougall, who was an indorser thereon. Summons was served on both defendants, and on the seventh day of April, Sprague filed an offer to allow judgment to be taken against him for \$3,520, with interest from the twentieth day of March, 1851, at five per cent. per month, which was accepted by the plaintiff, Ellis, and judgment rendered accordingly on that day. The complaint in this action was filed on the sixth day of June, 1859.

The plaintiff insists that there was no proof that Ellis advertised the sale as required by the power in the mortgage; to which the defendant replies that no such proof was necessary, and, if necessary, the recital of the fact in the deed to Eckstein is sufficient proof, and if not, that it will be presumed. It seems to be well settled that in sales of real estate by Sheriffs, it is only necessary to prove their power to sell by producing the judgment and execution. (2 Phillips' Ev., C. H. & E.'s Notes, 364.) And it is not necessary to show that notice of sale had been given as required by the statute, it being considered as merely directory. (*Smith v. Randall*, 6 Cal. 50; *Hayden v. Dunlap*, 3 Bibb, 216; *Hanson v. Barnes' Lessee*, 3 Gill & Johns. 359.) We see no good reason why the same rule should not apply to deeds executed by private individuals under a power, but it seems to have been decided otherwise in several cases. (*Jackson v. Clark*, 7 Johns. 226; *Ormsby v. Tarascon*, 3 Lit. 404; *Denning v. Smith*, 3 J. Ch. 332; *Sherman v. Dodge*, 6 Id. 107.)

Though such is the general rule, it has often been qualified and controlled by circumstances. Thus in *Bergen v. Bennett* (1 Caine's Cases, 16), it was held by Justice Kent, that after a mortgagor had lain by for sixteen years, he should not then be permitted to come in and question the legality of the notice under which the property had been sold, and every presumption was to be made in favor of the notice. In that case a less time than that fixed by the

Statute of Limitation of New York was held to estop the party, while in the present case the time during which the mortgagor has lain by without questioning the regularity of the sale far exceeds the time fixed by our statute. So in *Gray v. Gardner* (3 Mass. 399), where the real estate of an intestate had been sold by the administrator, it was held that a great lapse of time before the legality of the sale was questioned, the acquiescence of the heirs, and evidence of the publicity and fairness of the sale, were held to be strong circumstances to prove that the sale was regular, and that it had been duly advertised. Lapse of time and acquiescence in the possession of the purchaser, have been held sufficient to raise presumptions in favor of the regularity of even tax sales. (*Pejepscot v. Ransom*, 14 Mass. 145; *Read v. Goodyear*, 17 S. & R. 350; *Freeman v. Thayer*, 33 Maine, 76.) In the present case, Ellis acted as a duly authorized agent of Sprague, in selling the property and making the deed, and the presumption is that he duly and faithfully performed the duty required of him. (1 Phillips' Ev., C. H. & E.'s Notes, 604.) This rule extends to every man, both in his official and private character. So, too, it is presumed that a deed of a trustee, having power to convey upon a certain contingency, was not given until after the contingency happened (*Morrison v. McMillan*, 4 Lit. 210), and it is generally presumed that a trustee has faithfully executed his trust (*Shilknecht v. Eastburn*, 2 Gill. & Johns. 115). So, long acquiescence by one, in the adverse enjoyment of a right by another, leads to the inference that the former has parted with it in a legal form; and in time, may lead to the presumption of the necessary instruments of assurance, or of the requisites to make existing assurances valid against him. (1 Phillips' Ev., C. H. & E.'s Notes, 609.) Under a deed from executors authorized to sell the land at public auction, the deed is sufficient without showing that the sale had been publicly made, for the Court will presume that the executors had done their duty, and had sold in pursuance of the will. (*Turnipseed v. Hawkins*, 1 McCord, 272.) So, after a great lapse of time, the posting of advertisements necessary to the regularity of a proprietary meeting, may be presumed. (*Society for Propagating the Gospel v. Young*, 2 N. H. 310.) So, of a deed made by an attorney in fact; long

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acquiescence of the principal in the possession under the conveyance is evidence that the conditions on which the attorney was to make the deed had occurred, and that he did not transcend his power. (*McConnell v. Bowdry's Heirs*, 4 Mon. 395.) So, long possession under a deed made by an attorney, the power itself may be presumed. (6 Martin, N. S. 153.) In some peculiar cases this doctrine of acquiescence has been held to bar a party of most important rights, in very short periods of time; thus an acquiescence of nine years in a mining case was held sufficient. (*Prennergast v. Turton*, 1 Younge & Coll. Ch. Cases, 98.) So, of a delay of two years. (*Walker v. Jeffreys*, 1 Hare, 341; *Birmingham Coal Co. v. Lloyd*, 18 Vesey, 515.)

Again, the deed recites the fact that the notice of the sale was duly advertised, and this, it is insisted, is evidence of the fact. A recital in a deed of a material fact is held to be binding and conclusive upon the party reciting it, and against all claiming under him, as privies in blood, in estate, or in law. (1 Phillips' Ev., C. H. & E.'s Notes, 473, Note 130; 2 Id. 574, Note 476; *Osborne v. Endicott*, 6 Cal. 153.) In this case the recital in the deed of Sprague, by his attorney in fact, to Eckstein, is made by him as the grantor, and it is therefore binding upon him and the plaintiff who claims under him by privity of estate. It is considered as an admission on his part, which the law will not allow him, or those claiming under him, to deny, and it applies very appropriately to the recital of a fact, like the present, which is supposed to be peculiarly within his own knowledge, or the knowledge of his attorney who is acting for him. In such case it has been held to be a covenant of the existence of a recited fact. (2 Cal. 575, Note 476.)

The fact that this recital, admission, and representation of the publication of the notice, was made in a deed executed by Sprague's agent and attorney, can make no difference, and it is equally as binding upon him as though he had himself executed the deed. It was a representation and admission by the agent respecting the subject matter of the agency, within the scope of his powers as agent, made at the time, and in fact constituting a part of the *res gestæ*, and therefore is binding upon the principal. (Story on

Agency, Secs. 134, 135.) And it has been held that even the fraudulent or negligent statements, misrepresentations, and concealments of the agent will have the same effect, in many cases. (Story on Agency, Sec. 139.) If the recital in this case is not true in fact, and the principal has been injured thereby, he may have a remedy against his agent; but a Court of Equity will not permit him, or those claiming under him, to controvert or vitiate his own deed, and thus perpetrate a fraud upon an innocent purchaser, who bought and paid his money in good faith, relying upon the recitals in the deed as evidence of the validity of his title, and who has thereby been induced to expend money in the improvement of the property and the payment of taxes thereon. The plaintiff occupies no better position than Sprague. Eckstein's deed was duly recorded, and he had full notice of the deed and its recitals, as well by the record as by the actual possession of Eckstein.

It is objected, however, that the defendant, Solomon Eckstein, did not connect himself with the title of the grantee in the deed, Isaac Eckstein. It can make no difference, as far as concerns the present action, whether he did or not, for it is only necessary for him to show that the plaintiff is not entitled to the possession of the property, and this he has done by the deed from Sprague to Isaac Eckstein. This is sufficient to defeat the plaintiff's action. But he has gone further, and proved that he was in fact the real purchaser, that he paid the purchase money, that the deed was delivered to him, and that he has taken and held possession under it. These facts vest a clear, equitable title in him, and show that the grantee named in the deed is a mere naked trustee, holding the legal title for his use. When a man buys land in the name of another, and pays the consideration money, the land will generally be held by the grantee in trust for the person who so pays the consideration money. This principle has its origin in the natural presumption, in the absence of all rebutting circumstances, that he who supplies the money means the purchase to be for his own benefit, rather than for that of another; and that the conveyance, in the name of the latter, is a matter of convenience and arrangement between the parties, for other collateral purposes. (2 Story on Equity, Sec. 1201; *Hidden v. Jordan*, 21 Cal. 99; *Wells v. Robinson*, 12 Id. 141; *Osborne v. Endicott*, 6 Id. 153.)

The fact that Sprague admitted on the record, in the suit on the note, that there was due on the note the sum of \$3,520, an amount less than its face, with interest from the twentieth day of March, 1851, that being the very day of the sale of the mortgaged property, together with the fact that no foreclosure of the mortgage was asked for in that suit, affords very strong presumptive evidence that he knew of the sale of the property mortgaged, and of the application of the proceeds of the sale upon the mortgaged debt. There can be no doubt that the purchase money paid by Eckstein was applied on the mortgage debt, and was thus virtually received by Sprague. We consider this receipt by him of this purchase money as a clear waiver by him of all objections to the sale, and as a virtual ratification or acquiescence in the acts of his agent in relation to the sale and conveyance. He certainly has no right to retain the purchase money and at the same time repudiate the deed for which the money was paid. He has no right to both the land and the money. He who asks equity must do equity. By receiving the money he elected to affirm the sale, or he thereby at least waived all objections to it, and he is estopped from afterwards contesting its validity. (*Forrestier v. Bordman*, 1 Story, 52; *Palmerston v. Hexford*, 4 Denio, 166; *Pickett v. Pierson*, 17 Vermont, 478.)

Again, the defendant in this case has held the actual, adverse, and undisturbed possession of the premises for more than six years, a period exceeding the time prescribed by our statute for the enforcement of a right of entry, and his possession cannot, therefore, be disturbed. "As a general doctrine, it has too long been established to be now in the least degree controverted, that what the law deems a perfect possession, if continued without interruption during the whole period which is prescribed by the statute for the enforcement of the right of entry, is evidence of a fee. Independent of positive or statute law, the possession supposes an acquiescence in all persons claiming an adverse interest; and upon this acquiescence is founded the presumption of the existence of some substantial reason (though perhaps not known) for which the claim of an adverse interest was forborne. Not only every legal presumption, but every consideration of public policy requires that this evidence of right should be taken to be of very strong, if not of

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conclusive force." And the same doctrine is acted upon in a Court of Equity. (Angell on Limitations, 396, 399, 401; *Grattan v. Wiggins, ante.*) In the present case, the defendant took possession of the premises in good faith, in the full belief that he, through his trustee, had a good title to the property, and with the intention to hold it against the whole world. The deed under which it was taken purported to convey the title in fee, and this possession was not only actual by a substantial inclosure, but it was adverse to Sprague and all claiming under him, and the rest of mankind. It was adverse in its inception (though we do not think that fact essential), and has so continued ever since. We think it clear that these facts constitute a full defense to the claim of title sought to be enforced by the plaintiff in this action. The Court therefore erred in rendering judgment for the plaintiff, and under the facts should have rendered judgment for the defendant.

The judgment is therefore reversed, and the Court below is directed to enter a judgment for the defendant for his costs.

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THE finding of a jury upon a fact which they are so peculiarly fitted to decide as the genuineness of a signature to a conveyance, will rarely if ever be interfered with on the ground that such finding is not warranted by the evidence.

A witness will not be presumed to be interested because he is shown to have executed a deed to the party calling him of the land in controversy, where the deed itself is not produced, and no proof is made as to the covenants which it contained. The Court will not presume that the deed contained covenants of warranty.

A grantor to whom his grantee still owes a portion of the purchase money may remove his interest in the controversy between the latter and a third person as to the title by executing to the grantee a formal release of all claims for the balance due.

The decision in *Peabody v. Phelps* (9 Cal. 213), to the effect that an action for a false and fraudulent representation as to the naked fact of title in the vendor of real estate, cannot be maintained by the purchaser who has taken possession of the premises sold under a conveyance with express covenants; and that if a party takes a conveyance without covenants, he has no remedy in case of failure of title—commented on and its correctness when applied to cases of fraud questioned.

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Under Sec. 422 of the Practice Act as amended in 1861, the vendee of the defendant and vendor of the plaintiff is, without regard to his interest, admissible as a witness for the plaintiff upon an issue as to the genuineness of the defendant's deed, where the latter has been examined upon that question on his own behalf.

Where plaintiff claimed title through a deed purporting to have been made by the defendant to H. & N., the genuineness of which was denied by the answer : *held*, that a declaration of defendant that he had made a deed of the land to P., in connection with proof that P. had received no deed, and had negotiated respecting the purchase with N. & H., was admissible evidence for plaintiff as a circumstance tending to show that the defendant had actually made the deed to N. & H., and was probably mistaken as to the grantee.

Held, further, that declarations made by defendant to H. a few days before the date of the deed, were admissible on the same grounds.

Upon the trial of an issue as to the genuineness of a deed, the Court gave the following instructions to the jury : "If there is a reasonable theory consistent with the evidence by which the jury can find in favor of the genuineness of the deed, and consistent with the honesty and truthfulness of all the witnesses in the case, it is the duty of the jury to adopt that theory in preference to one by which perjury or forgery may be involved on the part of a portion of the witnesses :" *held*, that there was no error in giving this instruction.

Where, upon the trial, the genuineness of a signature is put in issue and made the subject of proof, a new trial will not be granted on account of the discovery of new evidence tending to prove the signature a forgery.

APPEAL from the Seventh Judicial District.

The affidavits filed in support of the application for new trial, on the ground of newly-discovered evidence set forth, that the affiants were experts, and some of them bank-tellers ; that they had compared the genuine signatures of Carillo with the signature to the deed, and that the latter was a forgery. No evidence of experts had been introduced on the trial. The other facts appear in the opinion.

E. A. Lawrence, for Appellant.

I. The verdict is not supported by the evidence. The two parties to the deed, Carillo and Millar, both deny the genuineness of their signatures. The other testimony in the case, on the part of both plaintiff and defendant, was testimony of an inferior grade. But one or two of the witnesses had ever seen Carillo or Millar write, and the rest of the testimony was confined to a comparison of the genuine signatures of these parties with their signatures on

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the deed. No witness on the part of plaintiff testifies to having seen either of them write, and their testimony does not rise to the dignity of rebutting testimony, or create a conflict with the testimony of Carillo and Millar.

II. The Court erred in permitting witness Hendley to testify.

1st. The deed from Hendley to plaintiff is not in the record. It is the best evidence as to whether he warranted the title, or conveyed by a bargain and sale deed. He does not testify as to the nature of the deed which he gave. He is presumed to be interested and incompetent, unless it appears that he did not warrant the title. (*Moon v. Campbell*, 1 Mumf. 600.) It has been repeatedly adjudicated that the vendor is not a competent witness where the validity of the title is involved. (*Blackwell v. Atkinson et al.*, 14 Cal. 470; *O'Blennis v. Corri*, 5 La. Au. 102.) So in regard to personal property, the rule is that the vendor in possession is not a competent witness for the vendee in an action against him, in which the title to the property is in controversy. (*Whiting v. Haywood*, 6 Cush. 82.) The reason of the rule explained in *Hoe* and also *Sanborn* (21 N. Y. 553). See, also, *Kingsbury v. Smith* (13 N. H. 109).

2d. Hendley was also incompetent, on account of his liability to plaintiff. This point was expressly decided by Chancellor Kent in the case of *Roberts v. Anderson* (3 Johns. Ch. 371). The decision there is put upon the express ground, not of an implied warranty, but of deceit or fraud practiced by the grantor upon her grantee. It might well be that a man having no title to land, but supposing he had, should convey to an innocent purchaser such title as he had by quitclaim deed, and be entirely innocent of any bad faith, and therefore be protected from liability in case of failure of title. But where a party is himself the grantee in a forged deed, and therefore, in contemplation of law, a *particeps criminis*, he cannot invoke any such protection for his sale, because he is guilty of a wrong. He has invested himself with the appearance of title by a forgery, which fact he is presumed to know, being a party to the forged deed, and against which the doctrine of *caveat emptor* will not apply. The Court below considered the case of *Peabody v. Phelps* (9 Cal. 213) as in conflict with the foregoing decision

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of Chancellor Kent, and therefore overruled the motion for new trial.

We submit that the learned Judge erred in the construction which he put upon that case. That was a mere case of failure of title, and the Court held that there were no implied covenants beyond those contained in the deed. But if this Court should be of the opinion that *Peabody v. Phelps* is a case in point, then we respectfully submit that the case should be reviewed and overruled. (See *Leonard v. Pitney*, 5 Wend. 31; *Culver v. Avery*, 7 Id. 380; *Whitney v. Allaire*, 1 Coms. 313.) We think the Court erred in holding that the question was an open one in the Courts of New York. But if so, it has since been decided adversely to the decision in *Peabody v. Phelps*, in the case of *Crandall v. Bryan* (5 Abb. Pr. 164), wherein the Court refers to the foregoing decisions as settling the law on that point.

The doctrine of *caveat emptor* will not be applied so as to protect the vendor who knowingly defrauds the vendee. (1 Hill. Vend. 354.) It has been applied only in cases where there has been no fraud. (*Snyder v. Laframbrise*, — Breese, 268; *Fowler v. Smith*, 2 Cal. 44; *Thayer v. White*, 3 Id. 229; 11 Id. 160; *Doyle v. Knuff*, 3 Scam. 388; 2 Hill. Real Prop. 319, Sec. 68; *Bates v. Delavan*, 5 —, 209.) And a party can repudiate the transaction when he discovers the fraud, provided there has been a failure of the whole consideration. (*Reese v. Gordon*, 19 Cal. 147; *Alvarez v. Brannan*, 7 Id. 503.) If there be fraud, the purchaser can come into equity for indemnity against eviction, disturbance, or defect of title. (*Deuston v. Morris*, 2 Edw. Ch. 37; 3 Cow. & Hill's Notes, 361-364, Note 950; Adams' Eq. 279.) Thus the verdict in this case would create a new responsibility, which the law would recognize and render available in favor of or reverse against the witness Hendley, and hence he ought to have been rejected. (*Conrad v. Kenyon*, 5 S. & R. 371.) Again: The judgment in this case would be evidence for or against him, provided Wright should bring suit against him (Hendley) to recover the \$2,250 paid, on the ground of fraud.

III. The Court also erred in permitting the witness Walker, to testify that Carillo had told him that he had deeded the land to

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Peabody, without the deed being produced or its absence accounted for, because :

1. This testimony was not cross-examination. 2. It was clearly incompetent, being in contravention of the Statute of Frauds; and the declarations made were of a vague character, in a casual conversation, and do not appear to have been acted upon. 3. The only issue before the Court was as to the genuineness of the deed from Carillo to Neville and Hendley, and it was error to allow plaintiff to make out his case by proving that Carillo had told witness that he had deeded the land to some one else (Peabody) than Neville and Hendley. Such testimony could do no good to plaintiff, and was certainly productive of harm to defendant. Evidence of a parol declaration of Penn, that the land in dispute was sold to the defendant, was refused by the Court, in *Richardson v. Campbell* (1 Dallas, 10). Parol declarations of one having title are inadmissible to prove or disprove title or disclaimer. (*Jackson v. Miller*, 6 Cow. 751; *Jackson v. Carey*, 16 Johns. 302; 2 Kent's Com. 478; *Rowe v. Bradley et al.*) 4. They seek to prove the contents of the deed—the date, and the description of the land conveyed—by this witness, without any foundation being laid. They have neither proved the deed to be lost, nor proved the execution of the deed, nor called for the subscribing witness. To admit the testimony under these circumstances, was in direct violation of Sec. 447 of the Practice Act. (1 Greenl. Ev., Sec. 95, 203; *Rex v. Carunion*, 8 East. 77.)

IV. The Court erred in permitting witness Hendley to testify to a conversation had with Carillo prior to the execution of the deed from Carillo to Neville and Hendley. This testimony could have been offered only on two grounds. 1st. As independent evidence that Carillo had conveyed to Peabody. In this aspect it was clearly inadmissible, as being irrelevant to the issue, and also as repugnant to the Statute of Frauds. 2d. If offered for the purpose of contradicting and impeaching Carillo, no foundation was laid for impeaching him by interrogating him as to these facts.

V. The Court erred in refusing the first and second instructions asked by defendant, and in giving the instruction asked by plaintiff, commencing: "If there is a reasonable theory consistent with the

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evidence." It is for the jury alone to weigh the evidence; the Court cannot instruct them how they shall weigh it, or what process of reasoning they shall adopt in coming at their results. It is for them to determine what credit they will give to the testimony of each witness, as it is their privilege as well as their duty to reject the testimony of a witness if they are satisfied, either from his statement or his manner on the stand, that his testimony is untrue; and this without any reference to any "theory" which they may choose to adopt in regard to the case. What authority has the Judge to charge them that they must adopt a "theory?" What right has he to charge them that they must, if possible, find in favor of the genuineness of the deed, and that, too, without submitting to them the question of fact whether the deed had been proved? How can he instruct them that they must believe in the honesty and truthfulness of all the witnesses? When stripped of all its circumlocution, it means, you must find in favor of the genuineness of the deed, and was considered as such by the jury.

VI. The affidavits of Sinton and others are filed as newly-discovered evidence; some of whom testify that they are bank-tellers, and all of them that they are experts, and that they have compared the genuine signatures of Carillo with the signature to the deed, and that the signature to the deed is a forgery. No experts were examined on the trial. The testimony is not cumulative.

W. C. Wallace and J. Temple, for Respondent.

CROCKER, J. delivered the opinion of the Court—COPE, C. J. and NORTON, J. concurring.

This is an action commenced in the District Court of Sonoma County to quiet the title to a section of land in the possession of the plaintiff, to which the defendant claims title. The action is brought under Sec. 254 of the Practice Act. The complaint alleges that the plaintiff is the owner and in actual possession of the premises; that defendant claims some estate or interest therein adverse to the plaintiff, which casts a cloud upon his title and lessens the value of his estate, and prays that defendant's claim may be declared invalid. The defendant, by his answer, denied generally

the allegations of the complaint, and averred that he was and still is the owner in fee simple, and entitled to the possession of the premises; that plaintiff's pretended title is fraudulent and void, and a cloud upon defendant's title; that plaintiff unlawfully entered upon the premises and ejected defendant therefrom, and unlawfully withholds the possession from the defendant, and prays that plaintiff's title may be declared null and void, and that he be ordered to deliver up the possession of the premises to the defendant. The plaintiff filed a replication to this answer, denying the allegations therein, and averring that on the tenth day of January, 1852, the defendant, for a valuable consideration, conveyed the premises to Hendley & Neville, from whom, through sundry mesne conveyances, plaintiff derived his title. The whole case depends upon the validity of a certain deed from the defendant to Hendley & Neville, dated January 10th, 1852, the plaintiff contending that it was genuine, and the defendant that it was a forgery. The following special issue was, therefore, submitted to a jury: "Is the document purporting to be a deed from Joaquin Carillo to John Hendley and Joseph N. Neville, dated Jan. 10th, A.D. 1852, a genuine deed?"

It was admitted by the parties that prior to the date of that deed, Carillo was the owner of the premises in controversy, and still is, unless said deed passed the title; that the plaintiff was in the possession of the premises and claiming title under the deed. The jury found that the deed was genuine, and the Court rendered a judgment for the plaintiff. A motion for a new trial was made, on various grounds, which was overruled, and the defendant takes this appeal from the judgment and the order overruling the motion for a new trial.

The first error assigned is that the evidence does not support the decision. The question whether the deed from Carillo to Hendley & Neville was genuine or not was a very proper one to be submitted to a jury. The jury in this case, and also the Court, found that it was genuine. A large mass of evidence bearing upon the question was introduced by the parties, and under these circumstances it would require a very strong showing against the verdict of the jury and the finding of the Court to induce us to hold that the decision was contrary to the evidence. Carillo was himself made a

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witness on his own behalf, and in answer to a question whether he signed the deed or not, he says: "I see here the name of Joaquin Carillo, but I do not *believe* that it is my signature." This is the strongest statement in all his testimony against the genuineness of the signature. He, of all others, should best know whether it was his or not. It is a matter peculiarly within his own knowledge, and yet he only testifies that he "believes" it is not his. The deed purported to have been acknowledged before J. M. Miller, a Justice of the Peace of Sonoma County. The attesting witnesses to the deed are E. T. Peabody and J. M. Miller. Miller was examined as a witness, and when asked whether the signatures attached to the deed, and purporting to be his, were genuine, he replied: "It is my belief it is not." Here this witness also testified upon belief to a matter which was within his knowledge. It is unnecessary for us to refer to the mass of testimony in the record bearing upon this point. The evidence was conflicting, and there is not such a preponderance of evidence against the verdict of the jury and finding of the Court as will justify this Court in setting aside the verdict, or reversing the judgment on this ground. Indeed we are inclined to hold that the weight of testimony is in favor of the verdict and judgment. So much, in such cases, depends upon the manner of the witnesses in testifying, to enable a Court to judge of the extent of credit to be given to their evidence, and on the comparison of admitting genuine signatures and other evidence of a like character, which is not and cannot be brought before an Appellate Court, that we should hesitate long before setting aside a verdict or finding upon a point like the one now before us.

The next error assigned is that the Court below erred in admitting Hendley as a witness to testify on behalf of the plaintiff. Hendley was one of the vendors who sold and conveyed the land to the plaintiff, but the deed executed by him was not introduced in evidence. Appellant contends that the Court should have presumed that he was interested and incompetent, unless it was made to appear that he did not warrant the title, and that it is to be presumed that the deed contained covenants of warranty. We know of no rule of law justifying such a presumption. The plaintiff offered the witness, and as he was not a party to the action the presump-

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tion was that he was competent; and as the defendant objected to his testifying on the ground of incompetency, it was for him to sustain his objection by proper proof, and if the alleged ground of his incompetency was that he was interested in the result of the suit in favor of the party offering him, by reason of having warranted the title to the plaintiff, that fact should have been shown by the defendant by proper proof; and the mere fact that the witness executed a deed to the plaintiff for the premises is no proof that such deed contained covenants warranting the title, nor will the Court presume that it contained such covenants. It is because a vendor of real estate is liable upon his covenants of warranty, and is therefore interested in defending the title of his vendee, that he is excluded from being a witness for his vendee. (*Blackwell v. Atkinson*, 14 Cal. 470.)

The examination of Hendley on his *voir dire* disclosed the fact that \$2,500 of the purchase money due from the plaintiff to the witness had not been paid, but the witness had canceled the debt by writing the word "canceled" across the face of the note, dating, signing, and delivering it to plaintiff's attorney. Defendant objected that the plaintiff was still liable to the witness, notwithstanding the cancellation and delivery of the note, and he was incompetent on the ground of interest. But the record discloses the fact that the witness, while the objection to his competency was being argued to the Court, executed to the plaintiff a formal release of his liability, and thereupon the Court overruled the objection. We see no error in this. Even if the cancellation of the note and its delivery thus canceled to the plaintiff, or his attorney, for the very purpose of discharging plaintiff from his liability, did not have that effect, which point we do not pass upon, still the formal release would be sufficient to remove all objection on this ground.

But it is also urged that Hendley was an incompetent witness, on the ground that he was liable for the amount of the purchase money (\$2,250) paid him by the plaintiff, in case the latter should fail in this action. It is contended that Hendley, being one of the grantees in the deed alleged to have been forged, is, in contemplation of law, a party to the crime; that his title was thus acquired by crime and fraud, and that he was guilty of a further fraud and

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deceit in selling and conveying to the plaintiff, and that plaintiff has a good cause of action against him to recover back the \$2,250 purchase money paid by him, on the ground of such fraud and deceit in the sale.

In reply to this, the respondent cites the case of *Peabody v. Phelps* (9 Cal. 213), where it was held that an action for a false and fraudulent representation as to the naked fact of title in the vendor of real estate cannot be maintained by the purchaser who has taken possession of the premises sold under a conveyance with express covenants; and that if a party takes a conveyance without covenants, he is without remedy in case of failure of title; if he takes a conveyance with covenants, his remedy, upon failure of title, is confined to them. In answer, the appellant contends that the case of *Peabody v. Phelps* is, upon this point, in direct conflict with the decision of *Alvarez v. Brannan* (7 Cal. 503) and the whole current of authorities, and he asks us to review and overrule this decision in *Peabody v. Phelps*. That case was decided after a full and elaborate discussion of the points involved, and this question seems to have been fully considered by the Court. Under these circumstances we should hesitate long before overruling it, and then only upon being fully satisfied that the Court had departed from and violated a well-established rule of law, and that the evils likely to flow from it were great. Instability and uncertainty in judicial decisions, especially those relating to titles of real estate, are great evils in any country. Upon no question is a community more sensitive than upon those which affect the titles to their homes, and in none should greater care and caution be observed by Courts in their adjudications. The prosperity and progress of a country depends so much upon the validity of its land titles that no Court can be justified in overturning long-settled principles of law relating to them, unless compelled to do so by the plainest dictates of reason and justice. The reports of judicial decisions are full of overruled cases. The highest Courts and the ablest Judges have repeatedly overruled and changed their own decisions, and this Court has been no exception. Human judgment is imperfect, and errors are a necessary consequence. Still, it is often better to submit to the evils arising from erroneous decisions, in view of the advantages

arising from certainty and stability, rather than encountering the often greater evils flowing from the fickleness and inconsistency of Courts. Under the system of this State, by which frequent changes of Judges take place in this Court, it is of special importance that we adhere to settled decisions, so far as a due regard to right and justice will permit, to avoid the danger of creating a feverish state of uncertainty in the public mind. Courts should carefully adhere to those well-established principles and rules of law, to be found in the adjudications of the English and American Courts, which form the basis of our system of jurisprudence. To these we look for that certainty so essential in legal matters, and upon which the prosperity of a community so much depends. No Court should therefore depart from these well-settled principles, unless they are clearly and plainly inapplicable to our circumstances and condition, or opposed to the laws of the State. The appellant contends that this decision, in the case of *Peabody v. Phelps*, is a plain departure from these well-settled principles of law, unjustly affecting the rights of innocent persons, and screening the defrauder and deceiver. There are certainly very strong reasons for contending that a person obtaining money by false and fraudulent representations respecting his title to land should be compelled to repay it, as much so as the seller of a horse or other personal property, and the fact that the vendee has neglected to secure himself by proper covenants of warranty should be no defense. The fraud may have been perpetrated and falsehood employed for the very purpose of inducing the vendee to take the conveyance without any or with insufficient covenants. That fraud has been successful has never been supposed to deprive the party defrauded of all remedy. The power of a Court of Equity, as well as of Law, has heretofore been considered most potent in such cases; but if such be the law, they are powerless in the most aggravated cases of deceit. The ruling upon this point in *Peabody v. Phelps* is clearly in conflict with the decision in *Alvarez v. Brannan* (7 Cal. 503), and it should be reinvestigated in some case where it can properly be adjudicated and upon a full argument of the question. In this case, it comes before us indirectly; and in the view we take of the admissibility of this witness, it is not necessary to be determined. Here, Carillo,

the vendor, was examined as a witness on his own behalf, under the amendment of 1861 to Sec. 422 of the Practice Act, to impeach his own deed, and we think it clear that the plaintiff, who was not himself cognizant of the transaction, had a right to examine Hendley, one of the vendees in the deed, without regard to the question of interest. He is "an adverse party or person in interest," within the intent and meaning of the statute. The amendment is careful to provide that when one party to a transaction testifies on his own behalf the other or adverse party in the same transaction shall also be allowed to testify; and in case one party is dead, then that the other shall not be admitted as a witness. We therefore see no error in permitting this witness to testify.

The next assignment of error is in permitting Walton to testify that Carillo had told him that he had deeded the land to Peabody and the time he so told him. We see no valid objection to this testimony.

Carillo's statements about having executed a deed or deeds to this land were admissible, as circumstances to show that this deed to Hendley & Neville was in fact executed by him, and that he was mistaken as to the name of the grantee. We understand this evidence to have been offered by the plaintiff, as admissions by the defendant upon this subject, and not for the purpose of proving a deed to Peabody, or its contents, if any such ever existed. The evidence of Hendley, respecting a conversation he had with Carillo a few days before the date of the deed, was also objected to, but we can see no error in its admission. It does not seem to have been offered to prove a deed to Peabody, or for the purpose of contradicting or impeaching Carillo, but merely to connect the deed to Hendley & Neville with the agreement by Carillo to convey a tract of land to Peabody, and to show that Carillo knew of the arrangement between Peabody and Hendley & Neville, by which the deed was made to the latter and not to the former. It also tended to show how Carillo might have been mistaken in supposing that he had made the deed to the former instead of the latter.

The appellant also assigns for error the refusal of the Court to give the following instructions asked by the defendant: "1st, that if the jury believe from the evidence that the pretended deed from

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Joaquin Carillo to Neville & Hendley was not executed in any particular as it now appears on its face, they are to presume that it is all false; 2d, that if the jury believe from the evidence that the plaintiff has failed to prove any of the signatures to said deed to be genuine, the jury should say that the said deed is not genuine." We see no error in refusing to give the instructions as thus asked for. It is also urged that the Court erred in giving the following instruction asked for by the plaintiff: "If there is a reasonable theory, consistent with the evidence, by which the jury can find in favor of the genuineness of the deed, and consistent with the honesty and truthfulness of all the witnesses in the case, it is the duty of the jury to adopt that theory in preference to one by which perjury or forgery may be involved on the part of a portion of the witnesses." We see no error in giving this instruction.

The last assignment of error is that the defendant has newly-discovered evidence, set forth in the affidavits of R. H. Sinton, B. R. Nesbitt, J. R. Fitch, Chas. H. Horton, and J. M. Neville, which he desires to introduce. This testimony all relates to the genuineness of the signature of Carillo to the deed to Hendley & Neville, and is therefore clearly cumulative, and it affords no just ground for a new trial of the cause.

It may be doubtful whether this action lies under the circumstances of this case; but as no question of that kind was raised by the counsel for the appellant, either in the Court below or in this Court, we merely refer to it that it may not be treated as a precedent in any future case.

The judgment is affirmed.

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A ~~MERE~~ equitable title to land, if of such a character as in equity entitles the holder to possession, is a sufficient defense, under our system of practice, to an action for the possession brought by the holder of the legal title.

Whenever a right claimed under the rules of the common law is denied, governed, or controlled by the principles administered by Courts of Equity the latter will prevail over the former.

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The plaintiff, to recover in ejectment, must show both a legal and equitable title, or right of possession. From proof of the legal title a right of possession will be presumed, but the presumption may be rebutted by proof of an equitable title in another of a character to carry the right of possession.

Where one contracting for the purchase of land received the possession with a bond for a deed upon payment of the purchase money, and containing a stipulation that the purchaser was in possession and entitled to the rents and profits: *held*, in an action of ejectment against the vendee remaining in possession by a subsequent purchaser from the vendor with notice, that the defendant should prevail without reference to the payment or non-payment of the purchase money.

The doctrine of *Gaven v. Hagen* (15 Cal. 208), that a vendee of real estate under a contract of purchase, which is silent as to the possession, has no right to the possession until a performance of the conditions prescribed by the contract to entitle him to a deed, commented upon and questioned.

APPEAL from the First Judicial District.

The following is the instrument executed March 20th, 1858, by Deputy to Wozencraft, defendant:

“Know all men by these presents, that I, William C. Deputy, of the County of San Bernardino and State of California, party of the first part, am held and firmly bound unto Oliver M. Wozencraft, of the county and State aforesaid, party of the second part, in the sum of one thousand and eight hundred and seventy-five dollars to be paid to said party of the second part, his heirs or assigns, to which payment well and truly to be made, I do hereby bind myself, my heirs, executors, and administrators, and each of them, firmly by these presents. The condition of this obligation is such, that whereas the said party of the second part having this day contracted with the party of the first part to purchase of him an undivided half of all that piece or parcel of land lying and being situate in the City and County of San Bernardino and State of California, and known on the official map of said city, recorded in the office of the Recorder of said county, as lots one (1), two (2), three (3), four (4), seven (7), and eight (8), in block eighteen, and is this day in peaceable possession of said premises in common with said party of the first part, with the full right to an undivided half of all the rents and profits of said premises from and after this date, and has for the purchase thereof executed and delivered to the party of the first part his certain promissory note, bearing even

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date herewith, for the full sum of one thousand, eight hundred and seventy-five dollars as the price of said land, the said note being due and payable as follows, to wit: twelve months after date. Now on the payment of the said note, principal and interest, and one-half of all the taxes assessed on said premises from and after this present date by the said party of the second part, his heirs or assigns, to the said party of the first part, his heirs, executors, administrators, or assigns, if the said party of the first part shall and does make, execute, and acknowledge or cause to be a good and sufficient deed, conveying and confirming unto the party of the second part, his heirs and assigns, an absolute and indefeasible estate of inheritance in fee simple, clear of all incumbrances, with general warranty, of, in, and to the said one undivided half of said lots one (1), two (2), three (3), four (4), seven (7), and eight (8) of land heretofore described with the appurtenances, then the above obligation to be void, or otherwise it shall be and remain of full force and virtue.

“In witness whereof, I have hereunto set my hand and seal this twentieth day of March, in the year one thousand eight hundred and fifty-eight.

W. C. DEPUTY.”

This instrument was duly acknowledged, and on the third day of May, 1858, recorded in the office of the County Recorder.

The Court, by whom the cause was tried without a jury, found as facts, among others, that Deputy was at the time of the execution of the above instrument the owner in fee of the premises; that he subsequently conveyed to Shackleford and he to plaintiff; that about the middle of September, 1858, the plaintiff entered into and occupied certain rooms in one of the buildings upon the premises, and “continued in possession of the same until February, 1859;” that defendant “was in possession on the twentieth day of March, 1858, and has been in possession thereof since said date, is now in possession thereof holding adversely to the plaintiff, and derives true title to an undivided half of the premises.”

All other material facts are stated in the opinion. Plaintiff had judgment in the Court below and defendant appeals.

S. Heydenfeldt, for Appellant.

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The bond from Deputy to defendant was more than a mere agreement to convey, it was an admission or acknowledgment of the right of possession, and its operation was to convey the right of possession. It is true that the right to a conveyance was dependent upon the payment of the purchase money, but the right of possession was not, that was independent and could only be defeated by enforcing the equitable lien for the purchase money, and having a judicial sale of the premises. The parties have made their contract. Legally, one of the conditions which induced defendant to enter into the agreement was, the unconditional conveyance of the right of possession; this right could not be forfeited by the non-payment of the purchase money, because there was no such stipulation. The agreement being recorded, was notice not only of the conditional undertaking to convey, but also of the unconditional right of possession which it particularly recites. Besides, the vendor has not complained of the non-payment of the purchase money, and indeed his sale to the plaintiff took place six months before the purchase money from the defendant was due. The defendant, therefore, has under his contract the legal right of possession, and cannot be ejected. The plaintiff may have the legal title, but could only take it subject to defendant's right of possession to one-half; and as the plaintiff sued for the whole, and shows only a right to recover an undivided half, her action must fail, and the defendant is entitled to judgment, at any rate she can only be entitled to judgment for one-half.

Stanly & Hays, for Respondent.

I. The agreement between Deputy and defendant was clearly inadmissible, it being foreign to the issue raised by the answer. The first rule governing the production of evidence is, "that the evidence offered must correspond with the allegations, and be confined to the point in issue." (1 Greenl. Ev. Sec. 51; *Cowan v. Price*, 1 Bibb, 175; *Morehead v. Ratler*, Id. 317; 2 Id. 4, 7.)

II. Conceding, for the purposes of the argument, that the bond was admissible, defendant did not show, nor even attempt to show, that he had complied or offered to comply with the condition pre-

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cedent which he was to perform in order to entitle him to a conveyance, or to enable him to obtain any benefit from the agreement.

The instrument by its very terms makes "the payment of the note, principal and interest, and one-half of all the taxes assessed on said premises," a positive condition to be performed before Wozencraft was entitled to a conveyance; and the rule is well settled that a party seeking to avail himself of a contract containing such a condition is entitled to no relief "unless he has shown himself ready, desirous, prompt, and eager" to perform the condition.

It is said that to enable Mrs. Willis to succeed in this action she must have been the owner of the note, and must have demanded payment and been refused. We respectfully submit, that the rule of law is directly the converse of that stated, and this Court has so expressly decided.

In *Knowles v. Shreve* (17 Cal. 275), where the bond was almost identical with the one under consideration, this Court held, that it was necessary to prove a demand by the obligees upon the obligor, to make the deed, and say: "the weight of authority is, that a demand must be made." And in *Fuller v. Hubbard & Williams*, (6 Cowen, 13) it was decided that where one agrees to convey land on the payment of money, the vendee must not only tender or pay the money, but he must demand a conveyance.

III. While it is true that the vendee is treated in equity as the equitable owner of the land, but this is only for some purposes (such as devise, descent, specific performance, etc.), but not for any purpose relating to any question fairly involved in this case. Equity does not regard him as entitled or as having any right to the possession, nor would equity tolerate him in possession for a moment, unless it were with the assent of the vendor. A simple contract to convey at some future time, silent about possession, gives the vendee no right whatever to enter into the possession or intermeddle with the land in any way. (*Suffern v. Townsend*, 9 John. 35; *Spencer v. Tobey*, 22 Barb. 260; *Cooper v. Stower*, 9 John. 331; *Kellogg v. Kellogg*, 6 Barb. S. C. 116; *Talbot v. Chamberlain*, 3 Paige's Ch. 219.)

It is true, that the contract in the case at bar does give the right of possession to the vendee, but that right only extends and was

only intended to extend until the purchase money became due, when if not paid, the possession reverted to the vendor. This is the fair interpretation of the contract, and the only one the law can put on it. (See *Wright v. Moore*, 21 Wend. 230; *Mitchell v. De Roche*, 1 Yates, 12.)

That an action for rents and profits or use and occupation will not lie against a vendee is undisputed, as the relation of landlord and tenant can only exist by express or implied agreement. The vendee entering with the consent of the vendor, at most, only establishes a quasi-tenancy at will, and the moment he neglects to comply with his contract he can be treated as a trespasser. (See *Smith v. Stewart*, 6 John. 46, where the doctrine is thoroughly examined; all the New York cases on this point will be found collected in *Jackson v. Miller*, 7 Cow. 747.)

At common law a tenant at will was not entitled to notice to quit. *Arguello v. Edinger* (10 Cal. 159) simply decides that the taking possession by a vendee, under a parol agreement to purchase, is a sufficient part performance to take the contract out of the operation of the Statute of Frauds. The case of *Wright v. Moore* (21 Wend. 230) is in point, and settles the law applicable to this case to be as claimed by respondent.

It has been admitted all through this case, that the right to a conveyance depended upon the payment of the purchase money. How can it reasonably be said, that after the time of payment had elapsed, and no payment been made, that the appellant could rightfully continue in possession? Possession is the only value that title gives. According to the position assumed the defendant was properly in possession after non-payment with a right to continue such possession. What then becomes of plaintiff's title? Is it to be a mere barren title producing no fruits? Giving the right of possession to the defendant would be virtually divesting the plaintiff of her title; she would retain the shadow, while the defendant enjoyed the substance. He who seeks equity must do equity, is a familiar maxim; and the appellant not having offered to pay the note given for the purchase money, is not entitled to the equitable interposition of the Court. While it is true that equity, under certain circumstances, treats things as done where they are only

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agreed to be done, yet it is equally true "that nothing is looked upon in equity as done but what ought to be done," and the appellant not having complied with his agreement cannot ask, nor ought the Court to consider the conveyance as made.

CROCKER, J. delivered the opinion of the Court—NORTON, J. concurring.

This is an action to recover the possession of several lots in the City of San Bernardino, the plaintiff in her complaint claiming to be the owner of the whole interest in them. The defendant in his answer sets forth that on the twentieth day of March, 1858, one Deputy was the owner of the premises; that on that day, Deputy sold and conveyed the undivided half of the premises, by an agreement duly executed, acknowledged, and recorded, to the defendant, and under it he entered and ever since has held the lawful possession. The case was tried by the Court, who found for the plaintiff, and rendered judgment accordingly for the restitution of the possession of the entire estate to the plaintiff.

Both parties claim title under Deputy. On the twentieth day of March, 1858, Deputy executed to the defendant a title bond, in the penal sum of \$1,875, by the conditions of which, after setting forth that the defendant had contracted to purchase of him the undivided half of the lots in controversy, and that the defendant was that day in peaceable possession of the premises in common with him, with the full right to an undivided half of all the rents and profits of the premises from and after that date, and that he had executed his note for \$1,875, due in twelve months, as the price of the land, it was agreed that on the payment of the note and one-half of all the taxes thereafter assessed on the premises, Deputy was to make, execute, and acknowledge to the defendant a good and sufficient deed for the conveyance of the premises, and then the bond to be void. This agreement or title-bond was duly recorded on the third day of May, 1858. On the eighth day of July, 1858, Deputy conveyed the premises to one Stapleford, and on the eighth day of September, 1858, Stapleford conveyed the same to the plaintiff.

The agreement executed by Deputy to the defendant clearly

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vested in the latter the equitable title as vendee, with the possession and right of possession of the property sold, being the undivided one-half of the premises. To a certain extent they became tenants in common of the property, Deputy holding the legal title to the entire estate, subject to the equitable title to the undivided half vested in the defendant, and the latter having the equitable title to the half, and the possession under it. Both Stapleford and the plaintiff had notice of the rights of the defendant by the record of the agreement, and his possession under it. The defendant seems to have recognized her rights, as, in September, 1858, she entered into and took possession of portions of the house situated on the premises, occupying several suits of rooms in it, to which the defendant seems to have made no objection. She continued in possession for some time, and there is no evidence that the defendant required her to leave. The Court found that the defendant was in the possession, "holding adversely to the plaintiff, and denies her title to an undivided half of the premises." This seems to be founded entirely upon a remark of one witness, H. M. Willis, that the defendant "is now in possession of the premises, holding against plaintiff, and denies her title." No explanation was given or circumstances stated corroborating this remark. It nowhere appears that the plaintiff ever notified him of her title, or ever demanded the possession, or requested to be let into the possession of her share with him, nor are there any special facts tending to show either an actual or constructive ouster of the plaintiff by the defendant, and we think neither this statement of the witness, nor the facts as found by the Court, are sufficient to establish an ouster.

The rights of the parties to the possession of this property depend entirely upon the agreement. There is no evidence showing whether the defendant ever paid the purchase money or not, and no proof that payment was ever demanded, or any other facts showing an abandonment by him of the purchase or a refusal by him to complete it. No proof was offered that Deputy, or those claiming under him, ever tendered a deed in pursuance of the agreement, or offered to deliver it upon payment of the purchase money. He may or may not have paid the purchase money at the time it was due, but the holder of the note had a perfect right to extend the

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time of payment or grant any indulgence he might see proper, and no one had any right to complain. The right to a conveyance was dependent upon the payment of the purchase money, but the right of possession was, under the agreement, immediate and continuous, and not dependent upon such payment. Deputy had a clear right to make such an agreement, and it bound him and the plaintiff claiming under him. The duty of a Court is to enforce contracts fairly and honestly made. The defendant has lost no rights vested in him under this agreement, and the right of possession conferred by it is clearly a good defense to this action. The fact that the legal title to this undivided half of the premises is vested in the plaintiff, and that the defendant's title thereto is merely equitable, can make no difference. A mere equitable title to land, if it is of such a character as entitles the holder to the possession in equity, is a sufficient defense, under our system of practice, to an action for the possession, brought even by the holder of the legal title. For, whenever a right claimed under the rules of the common law is denied, or governed, or controlled by the principles administered by Courts of Equity, the latter will prevail over the former, and it is the duty of the Courts in administering justice to decide and render judgment accordingly. It follows that it is the duty of the plaintiff to show both a legal and equitable right to the possession before she is entitled to recover. It is a general rule, however, that proof of a legal title is sufficient, as the presumption is that the holder of the legal title is entitled to the possession; but this presumption is liable to be rebutted by proof of an equitable title in another, of a character to carry the right of possession. In the present case the defendant showed more than the mere equitable title in the special agreement for the possession.

The respondent refers us to the case of *Gavin v. Hagen* (15 Cal. 208), in which it was held that a vendee of real estate, under a contract of purchase which was silent as to possession, had no right to the possession until a performance of the conditions of the contract to entitle him to a deed, and that the vendor or his assignee could maintain an action to recover the possession against the vendee at any time before such performance. There are very strong grounds for doubting the correctness of that decision upon these

points, especially as the rules of equity upon the question seem to have been entirely overlooked, and it may be well to refer to them, because, as we have shown, they should govern and control in cases of this kind.

The general principle is that, from the time of the contract for the sale of the land, the vendor, as to the land, becomes a trustee for the vendee, and the vendee, as to the purchase money, a trustee for the vendor, who has a lien upon the land therefor. And every subsequent purchaser from either, with notice, becomes subject to the same equities as the party would be from whom he purchased. Courts of Equity treat such contracts *precisely as if they had been specifically executed*. The vendee is treated in equity as the equitable owner of the land, and the vendor is treated as the owner of the money. This is a consequence of the common doctrine of Courts of Equity, that where things are agreed to be done they are to be treated for many purposes as if they were actually done. (2 Story's Equity, Secs. 789, 790, 1212.) A purchaser may, with the concurrence of the vendor, safely take possession of the estate at the time the contract is entered into. (1 Sugd. on Vendors, 9, 12.) Where a purchaser is let into possession on a treaty for purchase, he does not become tenant to the seller; and if the seller cannot make a title, it is doubtful whether an action will, under any circumstances, lie against the purchaser. (1 Sugd. on Vendors, 263, 311.) Such possession is lawful until the vendor puts an end to the contract. (*Jackson v. Moncrief*, 5 Wend. 29.) And an action for rents and profits, or use and occupation, will not lie against a vendee where the contract of sale, though unperformed, is still in full force. (*Johnson v. Beauchamp*, 9 Dana, 125; *Jones v. Tipton*, 2 Id. 295; *Howard v. Shaw*, 8 M. & W. 118; *Little v. Pearson*, 7 Pick. 301.) And as the possession of the vendee is lawful, an ejectment will not lie against the purchaser without a demand of possession and refusal to quit. (1 Sugd. on Vendors, 264, 312.) The taking possession by the vendee is a part performance of the contract in equity, sufficient to take the contract out of the Statute of Frauds, and the contract prevents his being treated as a trespasser. (*Arguello v. Edinger*, 10 Cal. 159.) The position of a vendor where the purchaser is in possession under the

contract is analogous to that of a mortgagee. (*Salmon v. Hoffman*, 2 Cal. 143.)

In Pennsylvania, where they have no Courts of Chancery, the Courts have administered equity in common law actions, and in actions of ejectment they enforce the rights of the parties in accordance with the rules and principles of equity. In that respect their practice is analogous to that of this State under the Code. The equitable title for many purposes is treated in the same manner as the legal title; equity considering that as done which a Chancellor would decree to be done, and for this reason the owner of the equitable title may support ejectment (*Schuylkill Nav. Co. v. Farr*, 4 Watts & Sergeant, 374; *Willing v. Brown*, 7 S. & R., 467; *Thomas v. Wright*, 9 Id. 91) even against the holder of the legal title. (*Presbyterian Congregation v. Johnson*, 1 Watts & Serg. 56.)

In ejectment by the vendor against the vendee in possession, the latter may maintain the possession, provided he has complied with his contract, or offers to comply with it by a tender of the purchase money on the trial of the cause. The rights of the defendant are not defeated by non-payment of the purchase money when it became due. (*Marlin v. Willink*, 7 S. & R. 297.) And the vendor cannot turn the vendee out of possession without rescinding the bargain, restoring the purchase money paid, and paying for the intermediate improvements. (*Richardson v. Kuhn*, 6 Watts, 299.) When by the terms of the contract possession was to be delivered before payment of the purchase money, and it was so delivered, after which the vendee was ousted by the vendor: *held*, he had a right to recover the possession without paying the purchase money. (*Bassler v. Neesly*, 2 S. & R. 355.) And the vendee may maintain ejectment in such case, though the contract is silent about the possession, where he went into possession with the consent of the vendor. (*Harris v. Bell*, 10 S. & R. 39.) And the vendor in such case is chargeable with the rents and profits for the time he is thus in possession, which may be applied on the unpaid purchase money. (*Wykoff v. Wykoff*, 8 Watts & Serg. 481; *Ives v. Cress*, 5 Barr. 18; *Hull v. Vaughn*, 6 Price's Ex. 157.) So much is the vendee considered, in contemplation of

equity, as actually seized of the estate, that he must bear any loss which may happen to the estate between the agreement and the conveyance, and he will be entitled to any benefit which may accrue to it in the interval, because by the contract he is the owner of the premises to every intent and purpose in equity. (*Richter v. Selin*, 8 S. & R. 440; *Paine v. Meller*, 6 Vesey, 349; 1 Sugden on Vendors, 330, 338.)

The case of *Gaven v. Hagen* (15 Cal. 208), however, differs very essentially from the present, in this—that there was no stipulation that the vendee was to have the possession, as in the present case, and it is not therefore in point. It is also objected that the defendant in his answer describes this agreement as a conveyance of the premises, when in fact it was only an agreement to convey. We do not deem that this makes any essential difference, as the instrument is sufficiently described to identify it, and the plaintiff is not injured by a mistaken statement of its legal effect.

The judgment in this case was for the possession of the entire estate, in which respect it is clearly erroneous, for the plaintiff is not entitled under the findings to a judgment for more than the undivided half of the premises, and not even for that, except upon proof of an ouster of the plaintiff by the defendant.

The judgment is reversed and the cause remanded for a new trial.

On petition for rehearing, CROCKER, J. delivered the following opinion—NORTON, J. concurring:

The questions involved in this case are important, and as the counsel for the plaintiff in their petition for a rehearing have referred to some authorities not cited before, it may be proper to notice them.

Whether, in equity, a vendee, in a simple contract to convey at some future time, which is silent about the possession, has a right to take and hold possession before the conveyance, is a question not before us, as the contract in this case specially gives him the right of possession. But it is now urged that this right of possession extends only to the time that the purchase money became due, and if the money was not then paid the right of possession in the ven-

dee ceased, and the same revested in the vendor. In this the plaintiff is in error. Such are not the terms of the contract, nor is such the proper equitable construction of it. There are no words in the agreement thus limiting the right of possession vested in the vendee. In support of the position that the law so construes it, the plaintiff cites us to the cases of *Wright v. Moore* (21 Wend. 230), and *Mitchell v. De Roche* (1 Yeates, 12).

The case in *Wendell* was an action of ejectment at law, and therefore governed purely by legal principles. The agreement of the vendor contained a covenant that the vendee might "have quiet and full possession of the said premises at any time after the payment" of the first installment of the purchase money. The Court say that "though the defendant's equitable title may be clear and perfect, its enforcement belongs exclusively to chancery." But even without that remark the Court based its judgment entirely upon the legal principles governing such cases, and it does not, therefore, govern the present case. The case in *Yeates* is not in point, as it does not appear that there was any agreement on the part of the vendor that the vendee should take and hold the possession. That was an early case in *Pennsylvania*, in which these questions do not seem to have been fully considered, and it is substantially overruled by the later decisions of that Court referred to in our former opinion.

The question whether a demand and notice to quit is necessary in a case of this kind was not presented by the defendant as a point in the case, and the reference to it in our former opinion was not for the purpose of settling or determining it, but merely as showing how the rights of vendor and vendee were treated by writers upon this subject and the authorities.

The plaintiff insists that the decision of this Court leaves her with a mere barren title, and that leaving the defendant in possession virtually divests her of her title. The plaintiff purchased the mere legal title, subject to the equitable title of the defendant. Equity deems the interest on the purchase money as an equivalent for the value of the rents and profits, or the use and occupation of the premises by the defendant. Equity treats the vendee as the owner of the property, and as such entitled to its rents and profits;

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and the vendor as the owner of the purchase money, and as such entitled to the interest thereon. (2 Sugden on Vendors, 254, 798, citing numerous cases.) If the plaintiff is the owner of or entitled to receive the purchase money due from the defendant, she has an ample remedy to enforce the vendor's lien in equity, and have the interest purchased by the defendant sold for the payment of the debt, and the interest she will receive will be an equivalent for the possession. If she is not entitled to the purchase money, she holds the mere legal title, subject to the equities of the defendant under the agreement. As that agreement gives the defendant the right to the possession, to oust him from that possession would be divesting him of a right vested in him by the agreement. The holder of the demand for the purchase money has the right to grant the defendant such lenity as he sees fit about its payment, and the plaintiff has no right to complain that the defendant has not paid the purchase money, unless it is due to her, when she has an ample remedy for enforcing that demand. We see no valid reason for granting a rehearing in this case.

The rehearing is therefore denied.

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CO. *et al.*

- A MORTGAGE given to secure a debt for the payment of which there is no written agreement, is a contract "founded upon an instrument of writing" within the meaning of the Limitation Act, and an action for its foreclosure may be maintained at any time within four years from its breach, notwithstanding that the statute has in the meantime run against the debt.
- A corporation, unless expressly prohibited by law or the provisions of its charter, has power to make all contracts that are necessary and usual in the course of the business it transacts as means to enable it to effect the object of its creation.
- A contract by a corporation, which is not upon its face necessarily beyond the scope of its authority, will, in the absence of proof, be presumed to be valid.
- A loan of money upon mortgage security by a corporation organized for the purpose of constructing ditches for the conveyance and sale of water is not necessarily an act exceeding its corporate powers. Such contract, if necessary to attain its general objects and made as an incident to the exercise of its granted powers, is valid. In the absence of proof, its validity will be presumed.

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In an action by a corporation upon a contract made by it with the defendant, the latter cannot interpose as a defense that the plaintiff in making the contract has exceeded the power conferred by its charter or the law under which it was formed. The question of a violation of its charter is one between the State and the corporation, and cannot be investigated collaterally by individuals.

A mortgage upon a flume or ditch not completed but proected and in process of construction, covers the whole work when completed, if apt terms expressing that intent are used in the instrument.

A flume for the conveyance of water is in the nature of real estate, and a mortgage upon it will, without any special provisions, include all improvements then upon the line of the work; and also all those which may afterwards be put thereon.

A decree foreclosing a mortgage and barring the equity of a subsequent mortgagee made a party defendant, should direct that the surplus proceeds of the sale after payment of the amount due upon the first mortgage, be applied upon the claim of the junior mortgagee.

A judgment will not be reversed for an error therein which the record enables the Appellate Court to fully correct.

The judgment will be modified and affirmed.

APPEAL from the Sixteenth Judicial District.

The "Union Water Company," plaintiff, was a corporation formed under the general law for the purpose of conducting water through certain ditches to mining districts, and the Murphy's Flat Fluming Company, defendant, was also a corporation formed in the same manner for the purpose of constructing a flume to be used in mining operations. March 5th, 1858, the latter company executed to the former a mortgage, by which in consideration of the sum of \$10,000 expressed to have been paid by the mortgagee, it conveyed "all and singular the right, title, interest, and possession, as well in equity as in law, which the said party of the first part has or may have in and to that certain sluice and flume known as the sluice and flume of the said party of the first part, situate in said County of Calaveras, at and near Murphy's Camp, and extending from Murphy's Flat to a point below on Angel's Creek, together with all right, privilege, or benefit, in and to the water passing, or to pass through said flume or sluice; and in and to the waters of Murphy's Flat; and in and to all and every the waters of Angel's Creek, and which may be or come to be in the possession of the said party of the first part, and as well the said sluice and flume when completed, and all and every part thereof, and so much

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thereof as is now complete, and all rights, benefits, and privileges which may accrue to the said party of the first part under a certain agreement," etc.

The consideration of the conveyance recited that, "whereas the said party of the first part is justly indebted to the said party of the second part in the sum of \$10,000, money loaned, payable in eighteen months from the date hereof, with interest," etc. If therefore the said indebtedness should be duly paid, the conveyance should be waived; but otherwise, of force.

No note accompanied the mortgage, nor was there in it any direct promise to pay the debt.

At the time of the execution of this mortgage the flume mentioned therein was in process of construction and was completed for a distance of only 1,200 feet. May 15th, 1858, and after the flume was finished for a distance of 3,600 feet, the Murphy's Flat Company executed a second mortgage thereon to one Traver for some \$4,000, to secure a note for that amount executed to him at the same time.

The action was commenced by plaintiff June 4th, 1862, to foreclose its mortgage, and Traver, as subsequent mortgagee, was made a party defendant. The mortgagor made no defense, Traver plead the Statute of Limitations, denied the power of plaintiff to make the mortgagee contract—and claimed that no property was covered by plaintiff's mortgage, except the portion of the flume in existence at the date of its execution.

The plaintiff had judgment for a foreclosure and sale of the whole property and application of the proceeds to its debt. The decree barred the rights of Traver in the property, and contained no direction as to the disposition of any overplus which might remain after application of the proceeds to plaintiff's debt.

From this judgment the defendant Traver, appeals.

H. O. Beatty, for Appellant.

I. Plaintiff's debt was barred by the Statute of Limitations before suit was brought, and therefore no recovery could be had against the Murphy's Flat Company, to the prejudice of Traver, who plead and relied upon the Statute of Limitations as a bar to the action.

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There was no note taken for the money when loaned, nor was there any other written instrument taken or given, except the mortgage, in connection with the loan.

The mortgage recites that the money had been loaned by the plaintiff to the Murphy's Flat Fluming Company, and that the mortgage was given as security; but the mortgage itself contains no promise to pay.

To determine the character of this debt due from the Murphy's Flat Fluming Company to the plaintiff, let us suppose the mortgaged property had been totally destroyed before the time for the payment of the borrowed money had arrived, and plaintiff had wished to bring suit for the \$10,000. To foreclose a mortgage, if the property had no existence, would be an absurdity. No Court of Equity would entertain jurisdiction the facts being known. The plaintiff, then, would have to bring suit in a Court of Law. What would be the form of action? and on what would it be brought? The mortgage contains nothing like an agreement, or promise to pay. It could not be the foundation of an action. You could not maintain debt or covenant on it; but the proper action would be assumpsit on the implied promise to pay arising from the act of borrowing. The mortgage would not be the foundation of the action, but might be evidence, in connection with other evidence, of the amount borrowed, the date of borrowing, the time of payment, etc.

Upon this proposition there is a decision of this Court directly in point. In the case of *Shafer v. The Bear River and Auburn Water and Mining Company* (4 Cal. 294, 295), this question was brought up in a case where the debt was as plainly recited as in this case; and the plaintiff having recovered judgment for his debt (there was no attempt to foreclosure), this Court set the judgment aside, and among other things, said: "There is no express covenant in the mortgage to pay the money, and no action will therefore lie, on its mere recital of the existence of a debt." This is directly in point, and shows that the declaration should have been in assumpsit, and not in covenant.

If the action must be in assumpsit, it is clear, that it is barred by the two year Statute of Limitations. The statute says: "Within two years, an action upon a contract, obligation, or liability, not

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founded on an instrument in writing." In this case, the obligation to pay and the ability to recover judgment for the debt, did not depend on any written instrument. The written instrument was a mere security for the payment of the debt. The debt itself existed in parol. If the debt was barred, then the mortgage, by operation of law, became a nullity. This Court has repeatedly decided that the mortgage is a mere incident of the debt. (See *Goodenow v. Ewer*, 16 Cal. 466, and many other cases.)

Suppose A is indebted to B by note, which is already overdue two years. To secure that note he executes a mortgage. When would the note be barred? Unquestionably at the end of two years from the execution of the mortgage. The mere recital that he owed an amount secured by note, already two years past due, would not extend the time of the note, but it would be barred at the same period as if no mortgage had been given. In that case it is clear the mortgage would only have an existence for two years. It would expire with the note. So in this case, the mortgage was given to secure a debt existing in parol, and expires at the end of two years; in other words, at the very time the debt would be barred if no mortgage was given.

II. The Union Water Company, as a corporation, had no right to loan money or to take mortgages.

It is a general rule that all corporations created by statute, whether general or special, have powers strictly limited to the terms in which they are conferred. In other words, corporations being the creatures of the law, can have no powers except those expressly conferred by the law, and such as are necessary to carry into effect those that are expressly conferred. The authorities upon this point are numerous and uniform. (See *Dunbar v. San Francisco*, 1 Cal. 356; 6 Pick. 32; 13 Peters, 587.)

In vain will you look in our statutes for any authority conferred on a mining corporation to loan money or take securities. If the corporation had no right either to loan the money or accept the mortgage, it would seem that it could not maintain any action on the loan, and more especially is it clear, that the mortgage would be absolutely void. While, possibly, there might be a question as to whether the action of assumpsit might not be maintained for

money had and received, where money had been paid on a void contract, it is absolutely certain, that no action can be maintained on any mortgage or other obligation given in pursuance of a void contract.

In the case of the *North River Insurance Company v. Lawrence* (3 Wend. 482-485), Chief Justice Savage, in delivering the opinion of the Court, says: "It has often been decided that a corporation can do no act but such as is expressly authorized or necessarily implied in their act of incorporation. The plaintiffs might loan money on bond and mortgage, but not on note. * * * It is sufficient answer to this action that the plaintiffs, in taking the note in question, have done an act which they had no authority to do. They have no capacity to become payees or indorsees of a promissory note. They cannot, therefore, sustain a claim in that character."

Here the plaintiff had no capacity to become a mortgagee, and therefore could not maintain an action in that character.

In the case of *Beach v. Fulton Bank* (3 Wend. 583), the same doctrine is more elaborately laid down and explained. The conclusion of that part of the opinion to which I refer is in these words: "And incorporated companies, having no powers except such as are granted, or necessarily incident, a company having no such power" (power to loan money), "express or implied, has no capacity to lend money, and of course cannot sue for it."

In 7 Wendell the same doctrine is laid down and enforced. That is, if a corporation not authorized by law to loan money does loan it, it amounts to an absolute forfeiture of the amount loaned. It is not merely a voidable contract, but is absolutely void. No suit can be maintained, either on the contract, or for money had and received.

The following language, being perfectly applicable to this case, is quoted from the last mentioned authority (7 Wend. 85): "But there is a fundamental objection to plaintiffs' recovery. They have no authority, by their charter, to loan money except on bond and mortgage. (Laws of 1822, 54.) They cannot make a valid contract of loan in any other manner; and, therefore, not only the security which may be taken but the contract itself is void, and

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cannot be the foundation of an action. Where a corporation is prohibited from discounting notes, or taking other peculiar security, but have a general power given them by their charter to loan money, if they make a loan and take the prohibited security the security is void, but the contract of loan is valid, and the money may be recovered under the general counts; but where not only the security, but the contract also is illegal, it cannot be enforced."

If the instrument was void, it could no more be used to prejudice a third party, than it could be against the mortgagor.

III. The decree, in this case, is so drawn as to forever bar the defendant, Traver, from proceeding on his mortgage; and yet it makes no provision for paying to him any part of the proceeds of the sale under the decree, although the amount of the sale might be more than the amount of the elder mortgage. Nor does it draw any distinction between that part of the property which was created before and that created after the first mortgage.

P. L. Edwards, for Respondent.

CROCKER, J. delivered the opinion of the Court—COPE, C. J. and NORTON, J. concurring.

This is an action to foreclose a mortgage. No note or other written obligation to pay the money appears to have been executed, nor does the mortgage contain any covenant or agreement to pay the mortgage debt. The action was commenced more than two years and less than four years after the time of payment of the money specified in the mortgage, and the appellant therefore contends that the action is barred by the Statute of Limitations. It is true that in the absence of a direct agreement to pay the money specified in the mortgage, the plaintiff is confined to his remedy against the mortgaged property, and can have no personal judgment against the mortgagor. (*Shafer v. The Bear River and Auburn W. and M. Co.*, 4 Cal. 294; *Brooks v. Maltbie*, 4 Stew. & Porter, 96; *Hunt v. Lewin*, Id. 138; *Hickox v. Lowe*, 10 Cal. 210.) But it does not follow that because there is no personal liability the action is barred in two years. The action is upon a contract "founded upon an instrument of writing," to wit: the

mortgage, and is not, therefore, barred until four years after the cause of action accrued. This point, therefore, is not tenable.

The next point is that the Union Water Company, being a corporation, had no right to loan money or to take mortgages. The act of April 14th, 1853, under which the plaintiff was organized, confers upon corporations of this character power "to make by-laws, not inconsistent with the laws of this State, for the organization of the company, the management of its property, the regulation of its affairs, the transfer of its stock, and for carrying on all kinds of business within the objects and purposes of the company." This is a direct vesting of power in the corporation, and is to be construed accordingly; and under it this Court has held that a corporation has power to make promissory notes, not as an express power, but as an incident to those powers. (*Smith v. Eureka Flour Mills*, 6 Cal. 1.) Independently of this special statutory provision, the common law annexes to a corporation when created, certain incidents and attributes, and there are several powers and capacities which tacitly and without any express provision are considered as inseparable from every corporation, among which is the power to make contracts and contract obligations. (Ang. & Ames on Corp. Sec. 110.) These incidental powers are, however, regulated and limited by the act or charter of incorporation. The general principle is, however, that a corporation has no other powers than such as are specifically granted, or such as are necessary for the purpose of carrying into effect the powers expressly granted. That is, the general powers of a corporation must be restricted by the nature and object of its institution. (1 Cal. 356, 452; 2 Id. 538; Ang. & Ames on Corp. Sec. 111.) It has been properly held that the general powers incident to bodies corporate are restricted by the nature and object of the institution of each, and every such corporation has power to make all contracts that are necessary and usual in the course of the business it transacts, as means to enable it to effect such object, unless expressly prohibited by law or the provisions of its charter. (*Barry v. Merchants' Exchange Co.*; 1 Sandf. Ch. 280, where this question is fully examined; Ang. & Ames on Corp. Sec. 257.) When the charter or act of incorporation, and valid statutory law are silent as to what contracts a cor-

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poration may make, as a general rule, it has power to make all such contracts as are necessary and usual in the course of its business, as means to enable it to attain the object for which it was created, and none other. (Id. Sec. 271.) The dealings of a corporation, which, on their face, or according to their apparent import, are within its charter, are not to be regarded as illegal or unauthorized, without some evidence to show that they are of such a character. In the absence of proof, there is no legal presumption that the law has been violated. On the contrary, they, like natural persons, are entitled to the benefit of the rule which imputes innocence rather than wrong to the conduct of men. • (Id. Sec. 111; *Chautauque County Bank v. Risby*, 19 N. Y. 369, 381.)

The mere fact that a corporation, organized for the purpose of constructing ditches for the conveyance and sale of water, makes a loan of money, does not, of itself, make such contract void, as an act exceeding its corporate powers. Such a contract may be necessary to enable it to attain the object for which it was created. For instance, it might be necessary for such a corporation to make advances in the nature of a loan, to enable a contractor to construct their works; or it might be very necessary for such a corporation to procure an additional supply of water, and a loan of money to another water company who may be engaged in constructing ditches which will bring such additional supply may be the direct and necessary means to attain that object. So, too, it might become necessary for a corporation engaged in a large enterprise—such as the construction of large canals, railroads, turnpike roads, and the like—to borrow money in large sums; and in order to obtain the money on favorable terms and at a low rate of interest, it might be necessary to borrow it upon long time, providing a sinking fund for its repayment, by setting apart a certain portion of the corporate revenues, to be loaned out on interest, suffering the principal and interest to accumulate to an amount sufficient to repay the borrowed money when due. Such is the usual mode of conducting the business of corporations of that character; and there can be no objection to it, so long as the legitimate business of the corporation is not changed into that of a Loan Company. So long as the loans are a mere incident to the exercise of its legiti-

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mate powers, they are rightful and valid. So, numerous other cases of a like character might be suggested, where loans by a corporation might be very proper and necessary in conducting its business operations; and if all corporations are to be considered as absolutely prohibited, or not permitted to make any loan of money except in the few classes of corporations where it is expressly allowed by the statute, and all such contracts are to be held void, a result would be produced which certainly never was intended by the Legislature, nor is it sustained by the rules of law.

A corporation had power to insure lives and grant annuities, and it was held that, as it must have funds to apply to those purposes, it might loan its money, and the loan by it would be presumed to have been made in the ordinary course of its business, and therefore valid, although it had no express power to loan money. The authority to loan money was upheld as an incident to the other powers conferred by the charter. (*Farmers' L. & T. Co. v. Clowes*, 4 Edw. Ch. 575; 3 Comstock, 470; *Farmers' L. & T. Co. v. ———*, 3 Sandf. Ch. 339.)

So, too, an insurance company was incorporated without any special provision in relation to the mode of investing its capital, and it was held that it had the power to invest the whole or any part of its capital by way of loans on bond and mortgage, and to reinvest it in the same way whenever it should become necessary or convenient to do so. (*Mann v. Eckford*, 15 Wend. 512.)

Where a bank was authorized to take mortgages in security for debts *previously* contracted, it was held that, if the loan and mortgage were concurrent acts, it was not a violation of the restraining clause of the statute. (*Silver Lake Bank v. North*, 4 J. Ch. 370; *Baird v. The Bank of Washington*, 11 S. & R. 411.)

A plank road company was not authorized to loan money, but if necessary it can legally loan a sum of money to one of its contractors to enable him to build a portion of the road. (*Madison, etc., Plank Road Co. v. Watertown Plank Road Co.*, 3 Wis. 173.)

A corporation was prohibited from dealing in goods, wares, and merchandise: *held*, that a loan made, secured by a quantity of cotton, which was to be shipped and sold, and the proceeds credited to the debtor on the loan, was not a violation of the charter. (*Bates*

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v. *State Bank*, 2 Ala. 465.) So, too, a sale by a bank of a quantity of butter which it had taken in settlement of a debt, was deemed no violation of a similar clause in its charter. (*Sacketts Harbor Bank v. Lewis County Bank*, 11 Barb. 213.) A glass company, not authorized to sell goods generally, sold goods to one in their service, and it was held that the Legislature did not intend to prohibit a supply of goods to those employed in the manufactory, and that the corporation might recover for them. (*Chester Glass Co. v. Dewey*, 16 Mass. 102.) Numerous other cases might be quoted establishing the same principle.

Again, in numerous cases it has been held, that a contract made by a corporation which is not authorized by its charter, is not to be held void, and that a defendant sued thereon cannot refuse payment; but the Legislature may inquire into any violation of the charter, or the Government may institute suit for that purpose. The investigation must be in a direct proceeding instituted by the Government for that purpose, and it cannot be had in a collateral way by individuals. (*The Grand Gulf Bank v. Archer*, 8 S. & M. 151, 173; *Wade v. American Colonization Society*, 7 Id. 663; *Bank of Port Gibson v. Nevitt*, 6 Id. 513; *Chester Glass Co. v. Dewey*, 16 Mass. 102; *Moss v. Rossie L. M. Co.*, 5 Hill, 140; *The Banks v. Poitiaux*, 3 Rand, 142, 146; *Vidal v. Girard's Executors*, 2 How., U. S., 191; *Fleckner v. U. S. Bank*, 8 Wheat. 355; *Natoma W. & M. Co. v. Clarkin*, 14 Cal. 552.)

This objection to the right of the plaintiff to enforce this contract is therefore overruled.

The mortgage in this case is of a certain sluice or flume extending from Murphy's Flat to a point below, on Angel's Creek, near the suspension flume of Emory & Co., together with the water passing through the flume and the waters of Murphy's Flat and Angel's Creek, "and as well the said sluice and flume when completed, and all and every part thereof, and so much thereof as is now completed, and all rights, benefits, and privileges which may accrue to the said party of the first part upon the completion thereof." It was evidently the intention of the parties that the mortgage should cover and include the whole sluice and flume, as well that which was then completed as that portion then unfinished

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and which might thereafter be completed. The appellant, Traver, who is a subsequent mortgagee, contends that the mortgagor could only mortgage the part then completed, and that the decree of foreclosure is erroneous, as it includes the whole flume, which, since the date of the mortgage, has been completed, and that it should be limited to that portion only which was finished at the date of the mortgage. This objection to the decree is not valid. The mortgage includes, as we have shown, the uncompleted, as well as the completed portions of the flume, and is equally valid as against the former as the latter. The property mortgaged was in the nature of real estate, and the mortgage, without any special provision, would include all improvements or fixtures then on the line located for the flume, as well as those which might thereafter be put thereon. (*Ferguson v. Miller*, 6 Cal. 402; *Soule v. Dawes*, 7 Id. 575; *Sands v. Pfeffer*, 10 Id. 258.)

The last objection is, that the decree does not make any provision for paying the overplus of the proceeds of the sale of the mortgaged property, if any there should be, to Traver, the subsequent mortgagee. This objection is well taken; but as this Court has full power to modify the decree in this respect, there is no necessity for reversing the judgment on that ground.

It is therefore ordered, adjudged, and decreed, that the judgment rendered by the District Court in this action be and the same is hereby amended by adding the following clause: "And the surplus money of the proceeds of said sale, if any there should be after paying the said indebtedness due the said plaintiff and said costs, shall be applied to the payment of the indebtedness due the said defendant, P. L. Traver, upon his mortgage upon said premises, and the remainder, if any, paid to the said Murphy's Flat Fluming Company."

And the judgment as thus amended is affirmed.

On petition for rehearing, the following opinion was delivered by CROCKER, J.—NORTON, J. concurring.

Some corrections of our former opinion are necessary, and a more full statement of our views upon one point may be proper. In the former opinion it is stated that in the absence of a direct

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agreement to pay the money specified in the mortgage, the mortgagee can have no personal judgment against the mortgagor. That was a point not necessary to be determined in this case, and should have been omitted, as it was not fully discussed by the parties in their briefs. The question whether an action to foreclose a mortgage is barred when the debt it was given to secure is barred, should properly have been more fully explained.

In most cases, the debt secured by a mortgage is evidenced by a writing in some form, either by a covenant or agreement to pay it in the mortgage, or by some independent written contract, such as a note, bond, or agreement. In such cases the same clause in the Statute of Limitations, fixing four years as the period of time which will bar the demand, applies to both the debt and the mortgage, and thus expressions are found in some cases of that character, to the effect that the mortgage is barred by the same lapse of time as the debt, which is correct when applied to cases where the debt and the mortgage are both evidenced by writing. In the present case, however, it appears that the debt is not evidenced by a written contract, either in the mortgage, or by a separate instrument. The Statute of Limitations does not operate as a payment or discharge of the debt, and the mortgagee still has the right to enforce any right of action arising out of the contract of the mortgagor, not barred by the Statute of Limitations. In this case his right to a personal judgment against the mortgagor is barred by the statute, the contract to pay the debt not being in writing, and the action not having been commenced within two years from the time the cause of action accrued. But the debt itself not being in fact paid or satisfied, and the contract, so far as it relates to the lien upon the property, being in writing, and not barred by the Statute of Limitations relating to written contracts, the mortgagee has a right to enforce the right of action against the mortgaged property, because the action, to that extent, is "upon a contract, obligation, and liability, founded upon an instrument of writing." This right of action is not therefore barred until the expiration of four years from the time the cause of action accrued, and the action in this case having been brought within the four years, it is not barred by the statute.

The rehearing is denied.

Gimmy v. Gimmy.

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In an action for a divorce, where the complaint states the existence of common property, the Court, in addition to granting the divorce, may order a division of the common property and that a homestead be set apart to the plaintiff, although no relief of this character is prayed for in the complaint.

Where the defendant appears and answers, the Court may, under Sec. 137 of the Practice Act, grant any relief consistent with the case made and embraced within the issues, although not specifically prayed for.

An objection that a complaint in an action for divorce, stating the existence of common property, is uncertain and defective in not stating the facts showing the property to be common, must be raised by demurrer or it will be deemed waived.

APPEAL from the Twelfth Judicial District.

The complaint alleges acts of extreme cruelty upon the part of defendant, a resident of San Francisco, and avers that he is "seized and possessed of real estate in said city and county of the value of fifteen thousand dollars, and of personal property of the value of five thousand dollars." The prayer is for a divorce from the bonds of matrimony, for alimony, and an allowance for expenses of litigation.

The answer denies the allegations as to acts of cruelty, charges adultery upon the plaintiff, and further denies that defendant has property to the amount stated in the complaint or to any amount exceeding \$2,000. The case was tried before a jury who found a special verdict, upon the charge of cruelty in the complaint and that of adultery in the answer, in favor of plaintiff. The Court, upon this verdict and the evidence, decreed a divorce, and adjudged that the plaintiff should have half the common property, without designating its value or description, and that the homestead upon which the plaintiff was then residing (describing it by metes and bounds) should be set apart to her.

From this judgment the defendant appeals.

John G. Gimmy, Appellant, *in pro. per.*

Porter & Sawyer, for Respondent.

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CROCKER, J. delivered the opinion of the Court—COPE, C. J. concurring.

This is an action for a divorce, brought by the wife against her husband, on the ground of extreme cruelty. The case was tried by a jury who found a verdict for the plaintiff, and a decree of divorce was accordingly granted, and it was also decreed that all the common property belonging to the parties be equally divided between them, and a certain lot of land was also set apart to the plaintiff, her heirs, and assigns forever, from which the defendant appeals.

The appellant contends that, as there is no prayer in the complaint for a division of the common property, it was a suit for a mere divorce, and the Court therefore erred in making such order for a division and setting apart the lot to the plaintiff. The complaint avers that the defendant is seized and possessed of real estate in the City of San Francisco of the value of \$15,000, and that he is possessed of personal property of the value of \$5,000, upon which issue was taken by the defendant by his answer. The tenth section of the statute defining the rights of husband and wife (Wood's Dig. 488) provides that "in case of the dissolution of the marriage, by decree of any Court of competent jurisdiction, the common property shall be equally divided between the parties, and the Court granting the decree *shall* make such order for the division of the common property, or the sale and equal distribution of the proceeds thereof, as the nature of the case may require; *provided*, that when such decree of divorce is rendered on the ground of adultery, or extreme cruelty, the party found guilty thereof shall only be entitled to such portion of the common property as the Court granting the decree may, in its discretion, from the facts of the case, deem just and allow," etc. In this case the defendant was found guilty of extreme cruelty, which left the division of the property subject to the discretion of the Court. The averments of the complaint in this case, if any were necessary, were sufficient, without any special prayer, to authorize the Court to render the decree it did relating to the property. Again, the defendant having appeared and filed an answer, the Court had the power, under Sec. 137 of the Practice Act, to grant the plaintiff any relief consistent with the case made by the complaint and embraced within the issue. The aver-

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ments of the complaint and answer brought this question in issue, and the Court therefore properly rendered a decree ordering a division of the property.

But the appellant also contends that the averments in the complaint relating to the common property are uncertain and insufficient, because it does not aver in direct terms or state the facts showing that the real and personal property thus owned by him were common property. He should have raised this objection by demurrer on that ground, then the plaintiff could have amended, and it is too late for him to raise it in this Court for the first time. The judgment is affirmed.

GIMMY v. DOANE *et al.*

WHERE some of several defendants make default and others answer, the defaulting defendants may appeal from the final decree at any time within one year after its rendition.

The statute which prescribes what shall be common property as between husband and wife, and how it shall be divided in case of a divorce, is a mere regulation of a right of property and does not provide a new right of action. A complaint for relief under this statute need not therefore comply with the rules governing the forms of pleadings in statutory actions.

The failure of a complaint, in an action for a division of common property, to state with sufficient particularity the facts showing the character of the property is a defect of form which must be objected to by demurrer.

A homestead may be established upon the common property of the husband and wife, and such homestead may, in case of a divorce, be partitioned or set apart to one of the parties as common property.

APPEAL from the Twelfth Judicial District.

The default of John G. Gimmy, one of the defendants, was duly entered by the Clerk, on the thirteenth day of May, 1861. Maria B. Gimmy, another of defendants, answered; and after a trial of the issues raised by her, a final decree against all the defendants was entered, November 15th, 1862. Notice of appeal from this decree was filed on behalf of both above-named defendants, November 18th, 1862.

The complaint averred that certain real estate (describing it by

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metes and bounds) was the common property of the plaintiff and her husband, John G. Gimmy, but did not aver any facts showing how the property came to be common property. The other facts are sufficiently stated in the opinion.

John G. Gimmy, Appellant, in pro. per.

I. In a suit for the division of the common property the complaint should state facts, and sufficient facts to show that within the statute "defining the rights of husband and wife," passed April 17th, 1850, there is common property, and should state in what the common property consists, its nature, its situation, and its value, and in what manner it has been acquired. (*Kashaw v. Kashaw*, 3 Cal. 322.)

In an action on a statute, the complaint must state all the facts which are requisite to bring the case within the statute, and must positively allege not only the acts but the qualifications, if any are prescribed by the statute. (*Brown v. Harmon*, 21 Barb. 508.)

There is no averment in the complaint, or any statement of facts, or anything to show that the property was acquired by the parties subsequent to the passage of the Act of April 17th, 1850. The complaint should not only comprehend an averment to that effect, but also averments showing that the property was not acquired in such a manner that the said statute would impress it with the character of separate property—averments showing that it was not acquired by gift, bequest, devise, or descent, or before marriage. This defect is fatal. (*Dye v. Dye*, 11 Cal. 163.)

II. The homestead is not common property, and therefore is not the subject of division, or conveyance, in a suit for the division of the common property, or for a mere divorce. The Court has expressly decided that the homestead is not common property. (*In the matter of Buchanan's Estate*, 1 Cal. 509; *People v. Gerard*, 6 Id. 73; *Revalk and Wife v. Kraemer*, 8 Id. 73; *Taylor v. Har-gous*, 4 Id. 273; see Homestead Acts.)

Porter & Sawyer, for Respondent.

CROCKER, J. delivered the opinion of the Court—NORTON, J. concurring.

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This is an action brought by the plaintiff, the wife of John G. Gimmy, one of the defendants, during the pendency of a suit for divorce brought by her against her husband, to restrain the sale and transfer of the common property, to set aside fraudulent judgments confessed by the husband, and a fraudulent conveyance of property by him to his mother, Maria B. Gimmy, one of the defendants, and for a division of the common property between the husband and wife upon the determination of the divorce suit. A default was entered against all the defendants, except Maria B. Gimmy, who filed an answer. Issues of fact were made, and tried by a jury, who found them all for the plaintiff. The Court, after the rendition of the decree granting the divorce in the divorce suit, rendered a final decree for the plaintiff, dividing the common property, in accordance with the decree in the divorce suit, and ordering the proper deeds to be executed by the parties, and enjoining them from conveying, incumbering, or interfering with the property conveyed and set apart to the plaintiff, and from this decree John G. and Maria B. Gimmy alone appeal.

It is objected that, as the notice of appeal was not filed until the lapse of more than one year from the date of default entered against John G. Gimmy, the appeal as to him is too late, and should be dismissed. The statute, however, clearly gives the parties a right to appeal at any time within one year from the rendition of the final judgment in the case. Any interlocutory judgment which may have been rendered does not form the basis for an appeal, and if it did, it would not bar the right of the defendant to appeal from the final judgment which determines the suit between the parties. (*Gray v. Palmer*, 9 Cal. 616; *Johnson v. Dopkins*, 6 Id. 83.)

The appellants also contend that the complaint merely avers that certain property is common property, and does not state sufficiently the particular facts, showing that it is entitled to that character, and that, therefore, it contains no cause of action, referring to the case of *Dye v. Dye* (11 Cal. 163). The averment is, that "during the cohabitation of said parties he was possessed of certain real estate, their common property," etc. The rule is well settled that where a statute gives a *right of action*, where none existed before, the complaint in such case should show "that the offense or act charged

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to have been committed or omitted by the defendant is within the provisions of the statute, and all the circumstances necessary to support the action must be alleged." (1 Chitty's Pl. 372.) This rule applies more particularly to actions of a penal character. But we do not understand that it has been extended to statutes which apply merely to *rights of property*, regulating the rights of persons in and to property, and which do not relate to *remedies* for injuries, or upon contracts. The statute which prescribes what shall be *common property* as between husband and wife, and how that common property shall be disposed of in case of a divorce between them, is a mere regulation of a right of property, and cannot properly be said to provide a new right of action. It does not, therefore, properly come within the rule invoked by the appellants, and the correctness of the decision in *Dye v. Dye*, so far as it relies upon this rule, may well be doubted. But it is not necessary to examine this question further, as the objection to the averment in the present case is more formal than substantial, and should have been taken by demurrer, as was done in the case of *Dye v. Dye*, and then the plaintiff could have amended. It is too late to raise the question here for the first time.

It is also objected that the homestead of the parties is not common property, and therefore not the subject of division after the parties are divorced. The homestead may be established upon the common property of the husband and wife, or the separate estate of the husband. (*Taylor v. Hargous*, 4 Cal. 273; *Revalk v. Kraemer*, 8 Id. 71; *Lies v. De Diablar*, 12 Id. 330; *Gee v. Moore*, 14 Id. 474.) When a homestead is once impressed upon the common property, the character of the estate is to a certain extent changed, and it is no longer subject to some of the incidents of common property. It can no longer be sold, conveyed, or incumbered by the husband alone, as it could before, and this was clearly the meaning of this Court when it said, *In the matter of Buchanan's Estate* (8 Cal. 509), "the homestead is not common property, but a sort of joint tenancy, with the right of survivorship." (*Cook v. McChristian*, 4 Cal. 27; *Taylor v. Hargous*, 4 Id. 273; *Pool v. Gerrard*, 6 Id. 73; *Estate of Tompkins*, 12 Id. 125.) There is no valid objection to a division of the homestead, which may have

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become attached to the common property, in case of a divorce, the same as other common property.

The complaint sufficiently alleges the fraudulent character of the judgments confessed by the husband, and of the conveyance by him to his mother, and of the intention of the parties to defraud the plaintiff thereby, to sustain the injunction and the final decree relating thereto.

We see no good reason for disturbing the judgment, and it is therefore affirmed.

The decision in this case was rendered at the same time with that in the preceding case of *Gimmy v. Gimmy*, and a petition for rehearing, applicable to both cases, was filed by appellant, upon which the following decision was rendered by CROCKER, J.—NORTON, J. concurring :

The appellant, in his petition for a rehearing in the above cases, relies with much confidence upon the alleged insufficiency of the averments in the complaints respecting the property which was the subject matter of the litigation. It is true that these averments are quite too general in their terms, there being a want of precision and certainty, and if demurrers had been filed to them on the ground that they were ambiguous and uncertain they would undoubtedly have been sustained. But the appellant having failed to demur, he is deemed to have waived the same. (Practice Act, Sec. 45.) They do not properly come within the latter clause of said section, because sufficient facts are stated, although they lack the requisite precision and certainty in the manner of their statement.

Rehearing denied.

RICHTER v. RILEY.

CERTIFICATES of purchase issued by the State Register for school land and certificates of location issued by the State Locating Agent are, under the Statute of April 13th, 1859, *prima facie* proof of legal title in the holder, and are admissible as evidence in his favor in an action of ejectment.

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APPEAL from the Seventh Judicial District.

The facts are stated in the opinion of the Court.

Whitman & Wells, for Appellant.

I. The certificate of purchase offered was evidence of title and should have been admitted. (Stat. 1859, 227.)

II. The certificate issued in conformity with the laws of the State of California and the laws of Congress. (Stat. 1861, 218; Id. 1859, 33; Id. 1858, 248; Acts of Cong. 1853, Secs. 6, 7; Id. 1826, 1844, 1859; *Doll v. Meader*, 16 Cal. 295; *Van Valkenburgh v. McCloud*, 21 Id.)

III. The State has a right to decide what shall constitute evidence of title between her citizens. (*Ames v. Palmer*, 6 Cal. 8.)

M. A. Wheaton, for Respondent.

By no law of Congress did the title of the lands to be taken in lieu of sixteenth and thirty-sixth sections ever vest in the State. Such lands must be located in accordance with the rules of the General U. S. Land Office or they are not located under any statute of this State, and a certificate of purchase showing the lands were not so located would not be a certificate of purchase issued under any statute of this State or of the United States, and is not *prima facie* evidence of title. (Stat. 1861, Sec. 4; Surv. Gen. Comp. 31.)

CROCKER, J. delivered the opinion of the Court—COPE, C. J. and NORTON, J. concurring.

This is an action to recover the possession of land. The case was tried by the Court, who found for the defendant, and judgment was rendered accordingly, from which the plaintiff appeals.

The plaintiff introduced on the trial, in support of his title, a *certificate of purchase* for the premises in controversy, issued by the Register of the State Land Office, bearing date the twenty-sixth day of November, 1861, for State school land. He also introduced in connection therewith, a *certificate of location* issued by the State Locating Agent, bearing date July 6th, 1861, and approved by the

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Surveyor-General of this State, October 1st, 1861, by which it appears that the tract located by the plaintiff was taken in lieu of a certain other half section of public land which had been pre-empted, and that the location was made under the law of this State approved April 22, 1861. (Stat. 1861, 218.) The defendant objected to the introduction of these papers, and they were ruled out by the Court; and this is now assigned as error.

On the thirteenth day of April, 1859 (Stat. of 1859, 227), the Legislature passed the following law: "The certificate of purchase, or of location of any lands in this State, issued or made in pursuance of any of the laws of the United States, or of this State, shall be deemed *prima facie* evidence of legal title in the holder of said certificate of purchase or location, or his assignees." The certificate of location and purchase offered in this case, were issued in pursuance of a law of this State, and were, therefore, *prima facie* evidence of legal title in the plaintiff. The Court, therefore, erred in ruling them out. The statute makes these certificates *prima facie*, not conclusive, evidence of title, and it therefore leaves them open to be attacked by any proper proof showing their invalidity. The burden of proof, however, is upon those contesting them.

The judgment is reversed and the cause remanded.

CUMBERLAND COLLEGE v. ISH.

A NOTE was executed by the defendant, payable to "the Board of Trustees of the Sonoma Academy or their successors in office," and specified that "no change in the name, character, or management of the said academy" should affect the liability of the payer. The complaint of the "Cumberland College" stated that the plaintiff was a corporation, and the same institution of learning formerly known as the "Sonoma Academy;" that the academy was, after its establishment, changed to "Cumberland College," and that the note was the property of the plaintiff: *held*, that this complaint showed a good cause of action in the plaintiff, and that a demurrer to it was improperly sustained.

APPEAL from the Seventh Judicial District.

The facts are stated in the opinion.

Harman & Hartley, for Appellant.

I. The note is payable to the "Board of Trustees of the Sonoma Academy, or their successors in office." The complaint avers that, "Cumberland College," plaintiff, is the same institution of learning that was formerly known as the Sonoma Academy, and the same mentioned in the promissory note hereinafter described. That is to say, the plaintiff here is in fact the payee of the note. Clearly this is sufficient. It is not a mere question of technical successorship. The original payee now sues under a new name, and it is competent to do this. (*Angell & Ames on Corp.* 581, bottom, 586.)

II. The objection here is not good on demurrer, but only in abatement. (*Id.*)

III. The note reads: "No change in the name, character, or management of the said academy shall affect the liability to pay this note;" and the complaint avers that "Sonoma Academy was established and afterwards changed to Cumberland College, and that said note is the property of Cumberland College." Here is a distinct liability, not to the technical successors, but to the Sonoma Academy under any new name. The complaint avers the new name to be "Cumberland College," and that the note is its property.

Whitman & Wells, for Respondent.

The whole question before the Court turns upon a conclusion of law, and that is, the identity of the plaintiffs with the payees of the note in suit. It is an averment false in law, that the plaintiffs, or the corporation they represent, are identical with the payees of the note, or their successors in office, or the Sonoma Academy. Such cannot be the case. There is no law of this State, or there was none at the time of making the note sued on, providing for or allowing the incorporation of academies. It is only by virtue of statutory enactments that individuals can sue in a corporate capacity. The note was given to individuals, though unnamed, and as individuals, they must have sued and must sue now; and the present plaintiffs, if they occupy the position they assume, must sue as individuals, and not in a corporate capacity. The plaintiffs do not

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allege that they sue as indorsers, trustees, or transferees of the original payees, but because Cumberland College is the same institution as Sonoma Academy, and they represent Cumberland College.

Again, the note is made payable to the Trustees of Sonoma Academy, or their successors in office. Are the plaintiffs the same individuals who were formerly the Trustees of Sonoma Academy? If so, it devolves upon them to plead it. Are the plaintiffs the successors in office of the Trustees of Sonoma Academy? This is a legal impossibility, for the office is different; the former having no right to sue, and no liability to be sued in corporate name—the latter having that privilege and liability by fact of statute. The Trustees of Sonoma Academy could have no standing in Court, except as individuals; their successors in office could have no other different or higher rights. The note provides that “no change in the name, character, or management of the said academy shall affect the liability to pay this note.” Granted; but the question here is, not of defendant’s liability to pay the note as provided therein, but of his liability to pay it under the present demand. He may be liable to pay it to the plaintiff as individuals, but not as representatives of a corporation, as the pleadings stand.

Admit that a corporation may collect, as trustee for individuals, demands due those individuals; still that is not the case at bar. The claim to collect is here based upon identity of being, and the pleadings show that there is no such identity.

CROCKER, J. delivered the opinion of the Court—NORTON, J. concurring.

This is an action upon a promissory note executed by the defendant in the following words: “Ten years after date I promise to pay to the Board of Trustees of the Sonoma Academy, or their successors in office, as a permanent endowment fund, the sum of five hundred dollars, with twelve and one-half per cent. per annum interest from date until paid, the interest payable annually; and if not so paid, or within twenty days after each installment becomes due as above, then the whole amount, principal and interest, becomes due and payable at the option of the holders thereof. The above is in

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consideration of the establishment of said Sonoma Academy. No change in the name, character, or management of the said Academy shall affect the liability to pay this note. Suisun, California, September 19th, 1860." The plaintiffs aver that they are a corporation; that they are the holders of the note, and that "Cumberland College" is the same institution of learning that was formerly known as the "Sonoma Academy" mentioned in the promissory note. They also aver that Sonoma Academy was established and afterwards changed to Cumberland College, and that the note is the property of Cumberland College. The defendant demurred to the complaint; the Court sustained the demurrer; the plaintiffs waived the right to amend, and final judgment was rendered for the defendant, from which the plaintiffs appeal.

It is insisted that the complaint does not show that the plaintiffs have any interest in the note which will entitle them to maintain this action; that they are not "successors in office" of the Trustees of Sonoma Academy; that the Cumberland College cannot in law be the same institution as the Sonoma Academy, and that the Sonoma Academy was not and could not be a corporation, as Cumberland College is. We do not think these objections tenable. Whether the Sonoma Academy was a corporation or not, we do not conceive can make any difference. We see no reason why a corporation may not have been formed, under the laws of this State, with that name. Under the peculiar terms of the note, it is due and payable to the institution then known as the Sonoma Academy, whatever change in the name, character, or management of the Academy might be made. The complaint avers that a change was made in the name from Sonoma Academy to Cumberland College, and thus the right to recover upon the note vested in the institution under its new name, by the special agreement of the defendant set forth in the note itself.

The judgment of the Court below is reversed, and the defendant is allowed ten days, from the service of notice of the filing of the *remittitur* in the Court below, to answer the complaint.

Halsey v. Martin.

HALSEY v. MARTIN.

WHERE land is mortgaged by an absolute deed with a defeasance back, an absolute conveyance of the premises by the mortgagee to a third person amounts to an assignment of the mortgage; the grantee being substituted to the rights of the mortgagee.

The interest of a mortgagor in a mining claim is liable to attachment and sale under execution, and the purchaser acquires the right of possession as against the mortgagee until foreclosure.

The plaintiff in ejectment to recover an undivided interest in land may have a recovery of a less undivided interest than that sued for.

APPEAL from the Fifth Judicial District.

The facts are stated in the opinion of the Court.

H. P. Barber, for Appellant.

H. O. Beatty, for Respondent.

CROCKER, J. delivered the opinion of the Court—COPE, C. J. concurring.

This is an action to recover the possession of seven-seventeenths of a quartz lead known as the "Alice and Emily Quartz Lead," on the north bank of the South Fork of the Stanislaus River, in Tuolumne County. The plaintiff claims as vendee of the purchaser under a Sheriff's sale on execution on a judgment rendered in a suit in which the interest in the lead of one Kyle, the judgment debtor, was attached on the first day of February, 1860. It seems that Kyle, on the fourteenth day of November, 1859, had conveyed to H. O. Beatty two shares of the lead, equal to two-seventeenths, by an absolute deed of conveyance, taking back a written defeasance, which shows that the deed to Beatty, though absolute in its terms, was substantially a mortgage. Beatty, in November or December, 1860, conveyed these two shares to the defendant Martin, by a deed absolute in its terms. On the trial a writ of attachment, issued in the action against Kyle in which the judgment was rendered, was introduced in evidence, with the written answer of Martin appended thereto, as garnishee, bearing date February 1st,

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1860, stating that he had then four shares in said claim in his possession, belonging to Kyle. The complaint avers that the defendants are in possession of the interest claimed by him, against his will and consent; that they refuse to surrender the possession and deny his right thereto, and refuse to recognize him as having any interest therein. The answer of Martin admits that he is in possession, and the other allegations above referred to are not denied. When the plaintiff had closed his evidence, the Court, on the motion of the defendants, granted a nonsuit; the plaintiff moved for a new trial, which was refused, and he appeals from the judgment of nonsuit and the order denying a new trial.

The Court erred in granting the nonsuit. There may be some question as to the number of shares in the lead owned by Kyle at the time of the levy of the attachment, but it is evident that he had an interest in the two shares mortgaged to Beatty, liable to the attachment. He held the equity of redemption and the right of possession until the foreclosure and sale under the mortgage, which was such an interest as could be attached, and which interest was conveyed to the plaintiff, by the deed to the purchaser at Sheriff's sale, and the deed of the purchaser to him. The deed from Beatty to Martin was after the levy of the attachment, and merely conveyed the interest the former had in the two shares, which was only that of a mortgagee, and it amounted substantially to an assignment of the mortgage. Thus Martin held these two shares subject to the equity of redemption in Kyle and those holding under him, claiming under the attachment. His title as mortgagee gave him no right to the possession as against the plaintiff. Martin was in the possession, denying the plaintiff's claim, and setting up an adverse title. These acts amounted to an ouster of the plaintiff, which gave him a right of action against him to recover possession to the extent, at least, of these two shares.

The judgment is reversed, and the cause remanded.

• Stout v. Macy.

STOUT v. MACY.

THE statute limiting the time for issuing execution upon a judgment to five years after its entry, applies to judgments rendered in suits to foreclose a mortgage, equally as to mere personal judgments.

Where in an action to foreclose a mortgage a decree was entered in the usual form for the sale of the mortgaged premises and execution against the debtor for any deficiency, and no process to enforce the decree was issued until more than five years after its entry, when the plaintiff in the judgment took out an execution: *held*, that an action might be maintained by the defendant in the judgment to enjoin all proceedings upon the execution.

APPEAL from the Fourth Judicial District.

The facts are stated in the opinion of the Court.

Sidney L. Johnson, for Appellant.

Sec. 209 of the Practice Act gives a writ of execution to the party at any time within five years after the entry of judgment in his favor. We can have no such writ under a decree of foreclosure until the sale of the mortgaged property has been made in accordance with the decree, and has resulted in a deficiency, leaving a balance due.

We have not reached the point where the period of five years spoken of in Sec. 209 begins to run. It has no application to proceedings for the foreclosure of mortgages, which are governed by the provisions of the first chapter of title eight, until judgment for a balance due after sale has been docketed.

There is nothing in all these provisions which limits the power of the Court to enforce its decree of sale, as the only equitable means provided by the statute for the foreclosure of mortgages. Until it has done so, the suit is still pending, no matter what the lapse of time. There is no limitation in our statutes to the duration of a suit. The power of the Court in cases of foreclosure remains until the property is sold and the proceeds disposed of. The Court—not the officer making the sale—receives and applies the surplus, to the satisfaction of subsequent liens, or returns it to the mortgagor. The decree of foreclosure may be final for the purposes of appeal, and of fixing the equities of the parties, but does not ter-

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minate the Court's control of the subject matter. Many cases of equity jurisdiction require such control to be exercised for years. A foreclosure of a mortgage where the debt is payable by installments, may require as many years as there may be installments. A balance may remain due after the successive sales, and judgment may be docketed therefor, on which the writ of execution spoken of in Sec. 209, may be issued by the party during five ensuing years.

Many other cases of equity jurisdiction might be instanced. A decree dissolving a partnership or corporation, appointing a receiver, and providing for the liquidation of the affairs of such companies, might involve many years of administration, of application and enforcement, in some shape of that decree, long after the period of five years from its first rendition. During all this time the *litis pendente* continues, and there is no limitation to it in the law or in the statute.

The counsel for respondent cites *Mason v. Cronise* (20 Cal. 211). The point decided in it is, that the limitation of five years in the seventeenth section of the Statute of Limitations, above cited, applies to domestic as well as to foreign judgments. There is nothing in it conflicting with the opinions we entertain of the law.

With respect to the law relating to decrees in cases of foreclosure, before the amendment of Sec. 246, we refer to *Chapin v. Broder* (16 Cal. 422), and *Rowland v. Leiby* (14 Id. 156).

F. A. Fabens, for Respondent.

Title seven of the Practice Act is entitled: "Of the execution of the Judgment in Civil Actions;" and chapter one is entitled: "The Execution." The first section of that chapter (Sec. 209 Practice Act) provides, that "the party in whose favor judgment is given may, at any time within five years after the entry thereof, issue a writ of execution for its enforcement, as prescribed in this chapter."

It follows, that no such writ can be issued after the lapse of five years from the giving of the judgment; and that no other way has been prescribed in which judgment can be enforced than that provided in this chapter.

By Practice Act (Title 1, Sec. 1): "There shall be in this State but one form of civil actions," etc., and the rules governing such action—whether equitable or legal—from the commencement of the action to the enforcement of the judgment, are to be found in the Practice Act, and to be strictly followed.

The term "execution" in Sec. 209 of the Practice Act is there used in its broadest sense, meaning the process by which the judgment is to be executed. Blackstone (Vol. 3, Ch. 26) defines the "execution" of the judgment as "putting the sentence of the law in force." "This," he says, "is performed in different manners, according to the nature of the action upon which it is founded, and of the judgment which is had or recovered." Whatever process, therefore, is used to enforce the judgment is the "execution"—varying, of course, according to the nature of the judgment—and the different modes of doing this are prescribed in Title VII, Ch. 1, Sec. 213, all under the title of "Executions." Whichever of these modes is made use of, according to the nature of the judgment, is the "execution for its enforcement," and can only issue within five years after the entry of that judgment.

CROCKER, J. delivered the opinion of the Court—NORTON, J. concurring.

This is an action brought by a judgment defendant to enjoin all proceedings upon an execution issued on the judgment. On the eighth day of June, 1852, Falconer & Moulton obtained a decree in the usual form for the foreclosure of a certain mortgage, and the sale of the mortgaged premises, against the plaintiff, Stout, and others. The decree stated the amount due to the plaintiffs, and directed that the mortgaged premises be sold, that the amount due be paid from the proceeds of the sale, and that, if the same were insufficient, execution issue against the defendant Stout, for the balance. This judgment was purchased by and assigned to the defendant's testator, but no execution to enforce the decree was ever issued until a short time before the commencement of this suit, in May, 1862. The defendant demurred to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action; the demurrer was overruled, and no answer having been

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filed, a final judgment was rendered for the plaintiff, enjoining all proceedings to enforce the judgment or execution, and the defendant appeals.

The principal question is, whether an execution can issue after the lapse of five years from the entry of a judgment rendered in an action to foreclose a mortgage. A judgment for the foreclosure of a mortgage and the sale of the mortgaged premises is governed by the same rules as other judgments, both as respects the Statute of Limitations of actions thereon, and the time within which execution for their enforcement can be issued. The Practice Act makes no distinction between judgments of that kind and others of a different character. All are treated alike. This Court has held that sales under executions issued on such judgments are subject to redemption, as in other cases. (*Kent v. Laffan*, 2 Cal. 595; *McMillan v. Richards*, 9 Id. 365; *Guy v. Middleton*, 5 Id. 392; *Harlan v. Smith*, 6 Id. 173.) Thus the principle that judgments for the foreclosure of mortgages are governed by the same rules as other judgments has been recognized by this Court. Sec. 209 of the Practice Act limits the time within which an execution can issue for the enforcement of a judgment to five years from the entry of the judgment, and this applies to judgments of this kind, the same as others. Sec. 214 allowed executions to issue after that date by a special order of Court, but that section was repealed in 1861, and that right, therefore, no longer exists. The defendant in this case had lost his right to an execution to enforce the judgment by the lapse of time, and the Court below properly rendered judgment against him.

The judgment is therefore affirmed.

TOWDY v. ELLIS.

WHERE the notice of appeal from an order overruling a motion for new trial has not been filed within sixty days from the entry of the order the appeal will be dismissed.

An acknowledgment of service indorsed on a notice of appeal as follows: "Due service of a copy of the within notice is hereby accepted to have been made this twentieth day of February, 1863," is no waiver of an objection that service upon the day mentioned is too late.

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- Any statement agreed to by the parties or duly settled and certified by the Court becomes a part of the record the same as a bill of exceptions, demurrer to evidence, or any other mode by which questions of law or matters of evidence were made part of the record by the old system of practice.
- An appeal was taken from a judgment and also from an order overruling a motion for new trial, and the appeal from the order was dismissed for the reason that the notice was not served in time. The transcript contained a statement on motion for new trial, but no statement on appeal or bill of exceptions: *held*, that on the appeal from the judgment the statement on motion for new trial properly formed part of the record, and might therefore be used in this Court, and that any alleged errors appearing therefrom affecting the judgment might be considered and passed upon.
- Whenever a matter of law or evidence is made a part of the record by a proper statement or bill of exceptions, whether such statement be filed on motion for new trial or on appeal, it is, if embodied in the transcript, on appeal, properly before the Appellate Court, and can be used by it to review the action of the Court below.
- If, on appeal from a judgment, the transcript contains a statement on motion for new trial which shows error occurring prior to or in the rendition of the judgment, and affecting its validity or the validity of any action of the Court prior thereto, the errors thus disclosed may be reviewed, and the judgment reversed therefor.
- A denial that property sued for is of the exact value alleged in the complaint is an admission of any lesser value.
- It having appeared that there was an agreement in writing respecting the transfer of certain goods from witness to K., counsel proposed to ask witness "how K. got the goods:" *held*, that the question was improper, the writing being the best evidence.
- Where, in an action against the Sheriff for taking goods, he justifies under an attachment against a third person, it is not necessary that his answer should set forth minutely every fact relating to the attachment suit. An answer which stated the time of commencement of the action, the names of parties, the Court, and that the goods were taken by virtue of a writ of attachment issued therein, held to be sufficient.
- In trespass for taking goods against a Sheriff who justified under a writ of attachment against a third person, he called as a witness his deputy, who stated that he served the attachment, and related certain conversations between himself and the plaintiff. On cross-examination he stated that "he was Deputy Sheriff, and under bonds to the Sheriff." Whereupon plaintiff moved to strike out his testimony on the ground of interest: *held*, that the motion was properly denied, as from the answer it was not certain that the character of his bonds was such as to make him interested.
- Held*, further, that the plaintiff having testified, the deputy, even if interested, was a competent witness under Sec. 422 of the Practice Act.
- An objection that a judgment in favor of defendants is improper because of the absence of any prayer for relief in the answer must be taken in the trial Court or it will not be considered on appeal.

APPEAL from the Fourth Judicial District.

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The complaint is verified, and alleges that on the twelfth day of March, 1862, the plaintiff, J. C. Towdy, was the owner and entitled to the possession of certain personal property, the items of which are set forth, and that defendant, on the day mentioned, unlawfully took the goods from the possession of the plaintiff, and still wrongfully detains them; that the value of the goods is three hundred and two dollars and forty-two cents, and prays judgment for a return of the goods, or for their value, with damages in the sum of one hundred dollars and costs.

The answer, also verified, is as follows: "John S. Ellis, the defendant in the above action, for answer to the complaint of the plaintiff therein says, that he denies, according to his information and belief, that the above plaintiff was, on the twelfth day of March, A.D. 1862, or at any other time, the owner of the goods and chattels mentioned in the complaint in said action, or that he was ever entitled to the possession of the same as alleged in said complaint, and he further denies that he became possessed of said property unlawfully and wrongfully detains the same from said plaintiff, or that he ever became possessed of said goods and chattels, or any part thereof, except the following, to wit: [here follows a list of a portion of the articles mentioned in the complaint], which said goods and chattels above mentioned this defendant now holds as Sheriff of said city and county, under and by virtue of a writ of attachment issued out of the District Court of the Twelfth Judicial District of said city and county, in a certain action brought therein by Louis Brunner, plaintiff, against Wm. A. Krohe, defendant, which said action was commenced and attachment issued on the first day of March, 1862, and pursuant to which said defendant herein took the above mentioned goods and chattels from the possession of said Krohe, and now holds them to satisfy any judgment that has been or may be obtained in favor of said Brunner against said Krohe in said action, and he denies that he has taken the said goods and chattels in any other manner. And the defendant further denies that he took said goods and chattels, or any part thereof, from the possession or custody of the plaintiff herein; and he further denies, according to his information and belief, that said plaintiff is entitled to the possession of the same, or any part thereof, or that the value

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of the same is of the sum of three hundred and two dollars and forty-two cents, as alleged in said complaint, or that said plaintiff has sustained any damage whatever; and the defendant further says, that, according to his information and belief, the said goods and chattels above mentioned were, at the time of said taking the property of said W. A. Krohe, in whose possession they were at the time of said taking, and that any claim of title to the same in favor of the plaintiff herein based upon any agreement or statement by said plaintiff and said Krohe, or either of them, is fraudulent and void. EARL BARTLETT, Defendant's Attorney."

Replication denying all the averments of the answer. The case was tried by a jury, who found a verdict for the defendant, and that he was entitled to possession of the property. Judgment was entered that plaintiff take nothing by his suit, and that defendant recover possession of the property from plaintiff, together with his costs. Plaintiff moved for a new trial, and upon this motion a statement was settled and agreed to by the attorneys of the parties. November 21st, 1862, an order was made denying the motion for new trial, and on the tenth day of February, 1863, a notice of appeal from the judgment and also from the order denying a new trial was filed. On this motion is the following indorsement: "Due service of a copy of the within notice is hereby accepted to have been made this twentieth day of February, 1863.

"EARL BARTLETT."

The transcript on appeal contains the judgment roll, the statement on motion for new trial, and the notice of appeal. There is no statement on appeal or bill of exceptions, and all the assignments of error considered by the Court are contained in the statement on motion for new trial.

The facts in reference to these alleged errors are sufficiently stated in the opinion.

M. Compton, for Appellant.

I. The Court erred in denying plaintiff's motion for judgment on the pleadings. The denials in the answer are bad and raise no issue. The answer denies in the very words of the complaint

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[repeating them], thus raising an immaterial issue as to those matters instead of meeting the substantial matters averred. How much of the complaint is true the defendant does not admit or deny. He simply swears it is not all true. Such a denial does not reach the substantial matters averred, but only raises an immaterial issue as to the particular manner in which the matter is alleged in the complaint. (*Sallinger v. Lask*, 7 How. Pr. 430; *Castro v. Wetmore*, 16 Cal. 379; *Caulfield v. Saunders*, 17 Id. 571; *Pierson v. Cooley*, 1 Code, 91.)

The denials are bad for being in the alternative. It leaves uncertain what it means to deny. (*Otis v. Ross*, 8 How. Pr. 193; *Porter v. Herman*, 8 Cal. 624; *Hopkins v. Everett*, 3 Code, 150; *Young v. Catlin*, 6 Duer, 443; *Plankman v. Vallejo*, 15 Cal. 639; *Boyce v. Brown*, 7 Barb. 80.) The denials should be in the disjunctive and not in the conjunctive. (*Hopkins v. Everett*, 5 Code, 150; *Busemons v. Coffee*, 14 Cal. 191; *Burke v. Table Mountain Water Co.*, 12 Id. 403.) As to the value of the property, the answer only denies it was of the precise value of three hundred and two dollars and forty-two cents, thereby leaving it undenied it was of the value of any sum up to that amount. This admits the property was of the value of three hundred and one dollars and forty-two cents. (17 Cal. 569; 7 Pr. 430.)

II. The answer must allege all those facts which, when the plaintiff's case is admitted or proved, the defendant must prove, in order to defeat the action. (*Catlin v. Gunter*, 1 Duer, 266.) The words "must" are imperative. (*McKying v. Bull*, 16 N. Y. 297.) A defendant cannot give in evidence any fact not set up in his answer. (*Diefendorf v. Gage*, 7 Barb. S. C. 18; *Kelly v. Weston*, 2 Coms. 501; *N. Y. Central Ins. Co.*, 20 Barb. S. C. 468; *Baker v. Bailey*, 16 Id. 57; *Dewy v. Hoag*, Id. 365; *Fay v. Gruristead*, 10 Id. 321; *Andrews v. Bond*, Id. 633; *Walton v. Minturn*, 1 Cal. 362; *Field v. Mayor of N. Y.*, 2 Seld. 129; *McKying v. Bull*, 16 N. Y. 297.) The new matter is not well pleaded. The answer setting up the attachment is by way of recital and not by way of allegation. (*Porter v. Herman*, 8 Cal. 624.) The answer does not aver jurisdiction in the Twelfth District Court, nor does it show the suit was brought to recover any

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sum whatever so as to constitute jurisdiction. The jurisdiction of the Twelfth District Court is limited to sums exceeding two hundred dollars. The answer as to jurisdiction is insensible, ambiguous, and doubtful, and pleadings must not be insensible, ambiguous, nor doubtful, but must be positive in their form. (Stephens on Pleading, 377, 378.) The nature of the action is not stated, nor is it averred the action was at law or otherwise. (*Pierson v. McCahill*, 21 Cal. 122.)

III. The Court erred in refusing to allow parol evidence to be given to show the delivery of the goods in question by the plaintiff to Krohe, in the month of December, 1861. The Court based its decision for its refusal on the ground that there was a written agreement. Admitting there was a written agreement, there was no ground for excluding the evidence. The evidence was not offered, nor did it tend to disprove the contents of the written agreement, but simply to show a delivery of the goods in the first instance. Evidence is admissible to show facts independent of and entirely consistent with the written agreement.

IV. The Court erred in refusing to strike out the testimony of the defendant's deputy Lamott. The testimony was improper. (*Santillan v. Moses*, 1 Cal. 92.) The witness was interested by being under indemnity to his principal and was liable for his torts. In a suit by a claimant of attached property against a Sheriff, the testimony of a subsequent attaching creditor who has executed an indemnity bond to the Sheriff to hold him harmless is inadmissible. (*Howland v. Willets*, 5 Seld. 170.) A driver is not a competent witness for his employer in an action for negligently driving against one without previously being released. (*Ferin v. Vallejo Wharf Co.*, 7 Cal. 253.)

V. The Court erred in charging the jury to the effect "that the making the sale and transfer of personal property, the law requires that the goods should not be left in such a disguise as to amount to a fraud upon the creditors of such person having possession."

Earl Bartlett, for Respondent.

I. The appeal from the order denying a new trial should be dismissed, on the ground that no appeal was taken from said order

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within sixty days from the time it was made. The order was made Nov. 21st, 1862, and notice of appeal given Feb. 10th, 1863. (Practice Act, Sec. 336, Sub. 3.)

II. There is no statement on appeal in said action from the judgment of the Court below, and therefore nothing that appears in the statement on motion for new trial, which is annexed to the record, can be inquired into for the purpose of reversing the judgment.

III. If there were any objections to the defense set up in the answer, or the manner of setting it up, the plaintiff should have demurred to it, and by his reply he waived all objections. (*Walker v. Woods*, 16 Cal. 68.) Further than this, such objections cannot for the first time be raised in this Court. (*Mamlock v. White*, 20 Cal. 600.)

Appellant, in reply.

I. The respondent can make no question on this appeal as to the appeal from the order denying the motion for new trial not being taken in time. The respondent accepted due service of the notice of the appeal (see indorsement). This is a waiver of the objection that it was not in time. (*Shaver v. Ocean Ins. Co.*, 9 Abbott, 23; *Tulman v. Bagley*, 12 Wend. 237.)

II. As to the objection that there is no statement on appeal, the statute itself makes the statement on motion for new trial the statement on appeal. (See Stat. of 1861, 590.)

III. A motion for a new trial is a proceeding entirely distinct from an appeal from a judgment. A party may pursue both at the same time (Voorhies' Code, Ed. 1860, 357), and may be either 1st, on a question of law; 2d, upon a question of fact; 3d, upon both questions of law and fact. (Id.) It may be upon the minutes of the Court, upon a case or exceptions. It may be before or after judgment. (Id.) And where there is no statement it leaves the party to argue his case on the judgment record alone. (*Robertson v. Hurd*, 3 Abbott, 115; *McComber v. Chamberlain*, 5 Cal. 327.) And upon the judgment record alone the defendant is entitled to no relief whatever—not even for his costs—because he demanded none in his answer. The answer admits the plaintiff's

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whole cause of action, and sets up no new matter sufficient to constitute a defense to the action. (See Appellant's brief on file.) The pleadings are the formal allegations of the parties of their respective claims and defenses for the judgment of the Court (Prac. Act, Sec. 36), and must be most strongly construed against the pleader. (*Chipman v. Emerie*; 5 Cal. 49.)

IV. The failing to demur does not waive the right to object on the trial, or in the Appellate Court, for the first time that the answer does not state facts sufficient to constitute a defense to the action. (*Higgins v. Freeman*, 2 Duer, 650; *Montgomery County Bank v. Albany City Bank*, 2 Seld. 459.) An incurable defect is never waived by any pleading, but may be taken advantage of whenever the parties are before the Court. (*Burnham v. DeBevoise*, 8 Prac. 159; *St. John v. Northup*, 23 Barb. 30.)

CROCKER, J. delivered the opinion of the Court—COPE, C. J. concurring.

This is an action to recover the possession of personal property, and the defendant, who is the Sheriff of the County of San Francisco, claimed that it was the property of one Krohe, and that he had levied upon it by virtue of an attachment against him. The defendant recovered judgment against the plaintiff for the possession of the property and for his costs, from which, and from an order overruling a motion for a new trial, the plaintiff appeals.

The new trial was denied on the twenty-first day of November, 1862, and the notice of appeal was filed February 10th, 1863, and the defendant accepted service of the notice February 20th. It is objected that the appeal from the order refusing a new trial was not taken within sixty days after the order was made, and therefore the appeal from that order must be dismissed. To this it is replied that the respondent has waived this objection by the terms of his acceptance of the service of the notice of appeal, which is in these words: "Due service of a copy of the within notice is hereby accepted to have been made this twentieth day of February, 1863," and we are referred to the cases of *Tatman v. Barnes* (12 Wend. 227) and *Struver v. Ocean Insurance Co.* (9 Abbott, 23). In those cases it was held that an admission of "due service of a

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notice" is a waiver of the objection that it was not served in time. In this case the acceptance only admits that the notice was duly served at a certain date, and cannot be considered as a waiver of the objection. The appeal from this order not having been taken in time, it will have to be dismissed, leaving the appeal from the judgment remaining.

The only statement in the record is the statement on the motion for a new trial, no statement on appeal having been filed. Sec. 195 of the Practice Act, as amended in 1861, provides that this statement, with the affidavits, depositions, etc., shall "constitute, without further statement, the papers to be used on appeal from the order granting or refusing the new trial." The respondent insists that as the appeal from the order refusing the new trial must be dismissed, therefore the statement falls with it and cannot be used for any other purpose. That its use is confined to the determination of the questions involved in that motion.

Any statement agreed to by the parties, or duly settled and certified by the Court, becomes a part of the record, the same as a bill of exceptions, demurrer to evidence, or any other mode by which questions of law or matters of evidence were made part of the record by the old system of practice. A statement is the substitute provided by the code for these former modes of proceeding, which were sometimes quite complicated in their nature, the "bill of exceptions" under the old system being still retained. Whenever, therefore, a matter of law or evidence is thus made a part of the record by a proper statement or bill of exceptions, whether such statement be filed on motion for new trial or on appeal, it is properly before this Court, the same as any other part of the record; and when before us it can be used to enable us to review the action of the Court below and determine whether or not any error has been committed. If the alleged error occurred prior to or in the rendition of the judgment, and affects its validity, or the validity of any action of the Court prior thereto, then such statement or bill of exceptions can properly be used on an appeal from the judgment. If, however, the alleged error relates to the action of the Court subsequent to the rendition of the judgment, as an order made on a motion for a new trial, or any other order made after judgment,

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then such statement or bill of exceptions can only be used on an appeal *properly* taken from such subsequent order. The appeal from the order refusing a new trial in this case not having been taken in time, the statement in the record can be used to review the action of the Court below only so far as it affects the judgment. The Court may have erred in refusing the new trial, but we cannot review that action, the appeal not having been taken in time. But we still have the right to use the statement in reviewing the action of the Court, so far as it relates to the judgment, the appeal from the judgment having been taken in time. We cannot, therefore, sustain the position of the respondent that the statement is to be entirely disregarded.

The first error assigned is that the Court below erred in denying plaintiff's motion for a judgment on the pleadings, and it is insisted that the denials in the answer are bad and raised no issue; that they are in the alternative and not in the disjunctive, and not specific; that the denial of the value is only of the precise sum stated in the complaint, and therefore it is no denial of any lesser sum. It is true that the denial of the value of the property is only of the sum stated in the complaint, and it is, therefore, an admission of any lesser value; but as to the other objections, they are not well taken. The answer specifically denies the most material allegations of the complaint, and therefore raised issues of fact, to be tried in the proper mode. Such being the case, it can make no difference, so far as relates to this motion for judgment on the pleadings, whether the new matter in the answer was properly pleaded or not, for in either event the Court properly overruled the motion.

It is also insisted that the Court erred in refusing to allow parol evidence of the delivery of the goods by the plaintiff to Krohe. The witness, who was the plaintiff, was asked how Krohe got the goods, and upon a question by defendant's counsel he stated that the agreement between them was in writing, and the Court properly refused to let him answer the question, the writing being the best evidence upon that point. The delivery was sworn to by this and several other witnesses without objection.

The next point raised is that the Court erred in admitting the record and papers in the suit in which the attachment was issued,

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on the ground that the facts were not sufficiently pleaded by the answer. This objection is not well taken. These proceedings were sufficiently set forth in the answer. It is not necessary to set forth minutely every fact relating to the suit, in cases of this kind.

The defendant called as a witness one Lamott, who testified that he was the Deputy Sheriff who served the attachment, and he related conversations between himself and the plaintiff relative to the sale of the goods by plaintiff to Krohe. On cross-examination he stated that "he was Deputy Sheriff and under bonds to the Sheriff," and thereupon plaintiff moved to strike out his testimony on the ground that the witness was interested, which was overruled, and this is alleged as error. The record does not disclose the terms or character of these "bonds to the Sheriff," or whether they made the witness interested in the result of this suit or not. We cannot presume error; it must appear by the record, and there is not sufficient here to establish it. Besides, if the witness was interested, it was as an adverse party in interest, or a person for whose benefit the action was defended, and as the plaintiff had been examined as a witness on his own behalf, he could not object to the competency of the witness under the provisions of Sec. 422 of the Practice Act.

We see no error in refusing the instructions asked for by the plaintiff and in the instructions given by the Court and which were excepted to. The charge given was correct as a proposition of law, and was founded upon evidence before the jury. It is insisted that the Court erred in rendering a judgment in favor of the defendant, because his answer contained no prayer for judgment. If this objection has any force, it should have been raised in the Court below, where the party would have been allowed to amend. It cannot be raised here for the first time.

The appeal from the order refusing the new trial is dismissed, at the appellant's cost. The judgment is affirmed.

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KELLY *et al.* v. LYNCH *et al.*

A PERSON not previously a party to a bill of exchange who, for a consideration, accepts the same, incurs thereby the liabilities of an acceptor equally as if he were the drawee.

Where one, not the drawee, accepted a draft for the sole purpose of protecting the interest of his foreign correspondent in a bill of lading accompanying the draft as collateral security, and took at the time an assignment of this bill of lading: *held*, that although the collateral security turned out to be of little value, its receipt was a legal consideration for the acceptance.

It is a sufficient consideration for the acceptance of a draft by one not a party to the paper, that the payee thereby loses the acceptance of the drawee.

Inducements, not amounting to fraud, held out by the payee of a draft to procure its acceptance, do not invalidate the contract of the acceptor.

APPEAL from the Twelfth Judicial District.

The facts are stated in the opinion.

Sidney L. Johnson, for Appellant.

I. There was no consideration for the acceptance. The consignment was worth nothing, as it did not even pay the expenses upon it. The counsel for plaintiffs invokes the principles of the commercial law applicable to bills of exchange, which make payees, and indorsees for value, unaffected by the want of consideration between the drawer and drawee who has accepted, and cites *Reynolds v. Robinson*, (2 Adolp. & El., 196—42 E. C. L. R. 634.) We do not come within the principle of the case cited. We were not drawees, nor in any manner parties to the bill. There was no privity between us and Goldbaum. We did not accept for his honor, nor that of any party to the bill. There was no protest of the bill for non-acceptance, without which there could be no valid acceptance for honor.

II. The plaintiffs, by their own acts, induced us to enter into this contract. To show how slightly may be the acts to which weight is given in the determination of such questions, we refer to the case of *Wilkinson v. Johnson* (3 Barn. & Cres., 428—10 E. C. L. R. 198.) Barron & Co., by coming to us in the way they did, placed us in such a situation that we were obliged to accept their offer or incur the risk of reproach from our correspondents.

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That was a motive for our acceptance, but not a consideration. The only consideration was the cargo, which was supposed and assumed by both parties to be sufficient, and turned out, by no fault of ours, to be nothing. We insist that the plaintiffs and their agents, led us by their own acts into this acceptance under the erroneous belief, which they shared with us, that the cargo was ample to cover it, and that a better result might thus be secured for the second draft, with the collection of which also they, not we, were charged.

III. The plaintiffs and their agents, who were bound to dispose of the consignment, and apply the proceeds to the payment of the drafts, have made us, under the facts of the case, agents and trustees for that purpose, and are only entitled to recover what we received and tendered them, and that without costs. So far as the defendants were concerned there could, in no event, accrue to them any benefit from the consignment. They could dispose of it only so far as it was necessary to pay the drafts, in which they had no interest, and must turn over the balance to Goldbaum. They were mere trustees for the different parties, and accountable as such. Their motive for accepting the trust has been stated. Friendship, blood, business relations, are motives for undertaking such burdens, not considerations for pecuniary obligations. The knowledge of the existence of such a motive made the plaintiff's agents turn it to the account of their own convenience.

C. Temple Emmet, for Respondent.

I. It is not correct to say that there was no consideration. The plaintiffs paid to Goldbaum, the maker and indorser of this bill of exchange, the full value thereof. They have therefore paid a full consideration, and stand before the Court as innocent *bona fide* indorsees for value. But the defendants insist that in addition to paying the maker of the bill the full value, the plaintiffs must show that they have also paid the acceptors the full value. In other words, that to entitle a *bona fide* indorsee of a bill of exchange to recover against the acceptors, he must show that he has paid for the bill twice over.

The idea of an additional consideration between a *bona fide* indor-

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see for value, and an acceptor, is surely a new doctrine in the law of bills of exchange. No such circumstance is essential to the liability of the acceptor, or occurs in fact upon acceptance. The acceptor must determine before making his acceptance how he stands with the maker, and what are his prospects for reimbursement. But having once accepted he cannot afterwards say to a *bona fide* indorsee for value, that he was mistaken in supposing that he would be protected, and therefore will not honor his acceptance. The case is precisely like that of *Robinson v. Reynolds* (2 Adolphus & Ellis, 196—42 Eng. Com. Law, 634). But in point of fact a full consideration did pass between the plaintiffs and defendants, viz.: the loss of Moore & Folger's acceptance, which they were ready to make, and upon which they would undoubtedly have been liable, whatever the condition of the cargo mentioned in the bill of lading.

It is hardly necessary to quote authorities to show that a consideration which consists in a loss or injury to one of the contracting parties is as valid and obligatory as would be one consisting in a gain or benefit to the other contracting party. (*Chitty on Contracts*, 31, and notes.)

II. The next ground of error alleged by the defendants is, that the plaintiffs, by their own acts, induced the defendants to enter into this contract. No representation was made or inducement held out. It was a matter of indifference to the plaintiff whether Moore & Folger took the consignment and accepted their draft, or whether the defendants did so; and the offer of it to the latter was purely out of consideration for the defendants and their principals. The defendants' argument seems to be, that it was the duty of the plaintiffs or their agents "to put the defendants upon their guard to inspire a doubt or a mistrust of the transaction." But how was it possible for the plaintiffs to do this, when they themselves never dreamed that there was occasion for doubt or mistrust? The defendants say that Barron & Co. placed them in such a situation that they were obliged to accept their offer or incur the risk of reproach from their principals. But the whole case shows, that it was a matter of indifference to Barron & Co. whether the defendants accepted the offer or not. It was made purely out of kindness

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and consideration for the defendants and their principals, and the defendants were entirely at liberty to decline it. By accepting it, they have deprived the plaintiffs of Moore & Folger's acceptance.

III. As to the defendants' third ground of error, viz.: that the plaintiffs and their agents were bound to receive and sell the consignments, and that in transferring it to the defendants they made the latter their agents and trustees, etc.

Not only was there no such obligation upon the plaintiffs or their agents, but it was never contemplated that they would do so. The consignment was not made to them, nor did they have any interest in the matter beyond being repaid the money which they had advanced.

CROCKER, J. delivered the opinion of the Court—COPE, C. J. and NORTON, J. concurring.

The plaintiffs, who are merchants at Mazatlan, advanced a sum of money to one Goldbaum, on a draft and bill of lading, signed by the master of a vessel, representing a shipment by Goldbaum of eight hundred and ninety-six hides and a quantity of bones and horns, deliverable at San Francisco. Goldbaum drew the draft for \$2,100 on Moore & Folger, of San Francisco, payable at three days' sight, to the plaintiffs or order, and indorsed the bill of lading, directing the hides, etc., to be delivered to Moore & Folger upon payment of the draft. Goldbaum being indebted to the house of Alsua, Dorn & Co., of Mazatlan, gave them also a draft on Moore & Folger for \$1,000, payable to their order at three days' sight, and with plaintiffs' consent made another indorsement on the bill of lading, directing that "after payment of the above mentioned draft of \$2,100," the draft for \$1,000 was to be paid before the delivery of the contents of the bill of lading. Alsua, Dorn & Co. indorsed their draft over to the plaintiffs, with instructions to pay the proceeds, when collected, to the defendants, who were their correspondents in San Francisco. The plaintiffs then indorsed over both drafts for collection, and forwarded them, with the bill of lading, to Barron & Co., of San Francisco. When the vessel arrived, Barron & Co. applied to Moore & Folger to accept the drafts and receive the consignment. They were willing to receive the con-

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signment, accept the draft for \$2,100, and pay over the surplus on the draft for \$1,000, but were not willing to accept the latter draft. Barron & Co. then went to the defendants, showed them the papers and the letter of Moore & Folger, and after some hesitation, they accepted the draft of \$2,100 for the interest of their correspondents, Alsua, Dorn & Co., and not for the honor or on the credit of Goldbaum. Moore & Folger indorsed their refusal to accept on the drafts, and Barron & Co. indorsed and assigned the bill of lading and the draft for \$1,000 to the defendants. When the hatches of the vessel were opened, it was discovered that there were only about thirty-one hides, and the balance of the cargo consisted of bones and horns, of no value—showing a gross fraud perpetrated by Goldbaum and the master of the vessel. The vessel and cargo were sold, and the net proceeds realized therefrom, which came to the hands of the defendants, was the sum of four hundred and sixty-six dollars and sixty-three cents, which they tendered to Barron & Co. for the plaintiffs, in payment of the draft, who refused to receive it. This action is brought against the defendants as acceptors, to recover the amount of the draft of \$2,100 with interest and costs.

The Court below rendered judgment in favor of the plaintiffs, from which the defendants appeal.

The appellants contend that their acceptance was without consideration, and therefore they are not liable. In this we do not agree with them. By means of their acceptance they obtained the assignment and possession of the bill of lading, and the plaintiffs were also thereby induced to dispense with the acceptance of Moore & Folger, which would have been as beneficial to them as that of the defendants. Here is a benefit resulting to the defendants, and a loss sustained by the plaintiffs, either of which forms a sufficient consideration to support the promise. The fact that the bill of lading was not of as great value as was supposed affects the adequacy of the consideration, but not its sufficiency in point of law. It is not necessary that the consideration be adequate in value to support the contract. But the loss of the acceptance of Moore & Folger is not only a sufficient consideration, but one adequate in value.

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These rules apply to cases where there is no admixture of fraud. In the present case, there is no pretense of any fraud on the part of the plaintiffs or their agents. The plaintiffs and the defendants, as well as their correspondents in Mazatlan and San Francisco, are all equally innocent parties. It is an unfortunate case for the defendants, but we see no just grounds for releasing them from their liability as acceptors of the draft.

The case of *Robinson v. Reynolds* (2 Adolphus & Ellis, N. S. 196) is fully in point. In that case Keegan obtained an advance from the National Bank of Ireland, upon a bill of lading, for butter purporting to have been shipped from Ireland to Liverpool, he giving to the bank his draft or bill of exchange for the amount of money advanced. The defendants, who were the drawees, accepted the bill, and received a transfer of the bill of lading from the bank. They soon ascertained that the bill of lading was a forgery, and then refusing to pay the draft, a suit was brought on their acceptance. The Court held that these facts constituted no defense to the action; that the bank were the indorsees and indorsees for value, and the failure or want of consideration between them and the acceptors constituted no defense; that the acceptance binds the defendants conclusively, as between them and every *bona fide* indorsee for value; and that it did not matter whether the bill was accepted before or after such indorsement.

But the appellants contend that that case is not in point, because they are not the drawees or in any manner parties to the bill. We do not see that that fact affects the principle. They made themselves parties to the bill by accepting, and thereby assumed all the liabilities and responsibilities of acceptors. There is one point in the present case in which it differs from the one cited. Here, there was a consideration for the acceptance, as we have shown; in that there was none, unless the transfer of a forged bill of lading could be considered one.

We see no ground for claiming that the plaintiffs by their acts induced the defendants to enter into the contract; in the absence of fraud, that would not enable the defendants to avoid the contract. Nor is there any just ground for asserting that the plaintiffs made the defendants their agents and trustees, to dispose of the

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consignment and apply the proceeds to the payment of the drafts. The liability of the defendants is as acceptors of the draft. We see no error in the action of the Court below.

The judgment is therefore affirmed.

McKEON v. McDERMOTT.

THE fact that the defendant in an action for the recovery of money has been garnished by a creditor of the plaintiff, constitutes no defense to the action, and cannot be set up in the answer as a plea in bar. The remedy of defendant in such case is by motion, based upon affidavit of the fact, for stay of proceedings until the action against the plaintiff or the attachment therein is disposed of.

A judgment rendered in an action tried by the Court without a jury prior to the twentieth of May, 1861 (the date of the act requiring exceptions to defective findings or want of a finding), will be reversed for a failure by the Court to file its findings of fact.

APPEAL from the Fifth Judicial District.

The facts are stated in the opinion.

D. S. Terry, for Appellant.

By the service of the attachment the defendant became liable to the plaintiff in attachment suit for the amount due from this plaintiff, which amount is greater than the judgment in this case, and a voluntary payment by defendant to plaintiff would have been fraudulent and void, as to the attaching creditor. (*Johnson v. Curry*, 2 Cal. 33; Prac. Act, Sec. 127.) And, of course, the Court cannot by its judgment compel a party to do that which the law declares to be a fraud upon a third party. (*Smith v. Brown*, 5 Cal. 118; *Brumager v. Boucher*, 6 Id. 16.)

II. The judgment having been rendered in this case prior to the passage of the amendment of May, 1861, the absence of a finding is fatal. (*Hoagland v. Clary*, 2 Cal. 474; *Russell v. Amador*, Id. 305; *Estell v. Chenery*, 3 Id. 467; *Breeze v. Doyle et al.*, Oct. Term, 1861.)

S. A. Booker and *J. H. Budd*, for Respondent.

McKeon v. McDermott.

I. The attachment was issued after the Court below, by the commencement of this suit, had acquired jurisdiction both of the parties and of the subject matter, and no part of the same could be withdrawn from the consideration of that Court, nor any of its proceedings delayed by reason of process issued from any other Court possessing merely equal powers. (*Gorham et al. v. Toom et al.*, 9 Cal. 77; *Unfelcter v. Ley*, Id. 607.)

A Court need not allow a party to intervene, if, by so doing, the trial of the action between the original parties is to be delayed. (*Hockey v. Kelly*, 14 Cal. 164.)

An attachment is neither a defense nor a counter claim. (Prac. Act, Sec. 47.)

II. The main allegations of the complaint are admitted by the pleadings (14 Cal. 112); especially after the sustaining of demurrer to the alleged illegal consideration of note, which is not assigned as error, and no findings as to those allegations were necessary. (8 Cal. 445.) This Court will certainly not require the finding of the Court below to specify each particular item of counter claim allowed or rejected—a general finding of the fact, that a specified amount is due plaintiff from defendant, being sufficient.

CROCKER, J. delivered the opinion of the Court—COPE, C. J. and NORTON, J. concurring.

This is an action upon a promissory note. The defendant by his answer set up several defenses. 1st. That the note was given for an illegal consideration. 2d. That an attachment for \$2,800 was issued in a suit in favor of one Irvine against the plaintiff, under which he, the defendant, had been garnisheed; and also, 3d. Setting up various payments and matters of set-off. The plaintiff demurred to the several defenses in the answer, and the Court sustained the demurrer as to the defenses of illegality of the consideration and the service of garnishment upon the defendant. The issues were tried by the Court without a jury, and a judgment rendered for the plaintiff, from which the defendant appeals.

The sustaining of the demurrer to that part of the answer in which the defendant alleged that he had been garnisheed, is the first error assigned. There was no error in this action of the Court.

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The proper course in this case was for the defendant to set up these facts in an affidavit, and move the Court for a stay of proceedings in this action, until the proceedings in the action brought by the attaching creditor should be disposed of. He would have been entitled to relief in that mode. (*McFadden v. O'Donnell*, 18 Cal. 160.)

The case was tried by the Court, a jury being waived, but the Court failed to file any findings, and this is assigned as error. This is well taken. The judgment in this case was rendered January 29th, 1861, prior to the passage of the Act of May 20th, 1861, which provides that "no judgment shall be reversed for want of a finding, or for a defective finding of facts, unless exceptions be made in the Court below to the finding, or to the want of a finding" (Stat. 1861, 589), and is not, therefore, governed by that Act. It has been repeatedly held by this Court, in cases adjudicated before the passage of the law of 1861, that a judgment will be reversed for want of a finding in cases tried by the Court without a jury.

The judgment is reversed, and the cause remanded for further proceedings.

BOSTWICK v. McCORKLE *et al.*

ACTION to determine an adverse claim to land, the complaint averring that plaintiff who was in possession, derived title through a deed from G. Answer that previous to the execution of G.'s deed the land was attached at suit of a creditor of his, and was subsequently in due course sold by the Sheriff, at which sale defendant became the purchaser. Replication that a portion of the debt on which the attachment issued was secured by a collateral note, and that the attachment was therefore void: *held*, that on these pleadings, in the absence of proof, judgment was properly entered for defendant; that if plaintiff had the right to attack the attachment in this form (a point not decided) the burden of the proof was on him to show that the attachment debt was collaterally secured.

Where the transcript contained, together with the judgment roll, a copy of an order, certified to by the Clerk, sustaining a demurrer to a replication, and there was no statement or bill of exceptions: *held*, that the Appellate Court could not review the action of the Court below upon the demurrer.

APPEAL from the Seventh Judicial District.

The record in this case consists of the following papers : Complaint ; summons ; answer of defendant Tucker ; demurrer of defendant McCorkle ; amended complaint, demurrer of Tucker to amended complaint, replication ; demurrer of Tucker to replication ; an order that " defendants' demurrer filed herein " be sustained ; order dismissing as to McCorkle ; judgment for defendant Tucker ; notice and undertaking on appeal and a certificate by the Clerk that the foregoing are true copies of the originals.

The nature of the pleadings is stated in the opinion of the Court.

Wallace & Rayle, for Appellant.

Thos. J. Tucker, Respondent, *in pro. per.*

CROCKER, J. delivered the opinion of the Court—COPE, C. J. and NORTON, J. concurring.

This is an action to remove an alleged cloud upon plaintiff's title to land owned by and in his possession. The complaint avers that the plaintiff's title was derived by mesne conveyances from one Grigsby under a deed executed by him, dated July 16th, 1861, and that the defendants claim an adverse lien or title thereto, which is subordinate to his title. McCorkle demurred to the complaint on the ground that it was uncertain, etc., and that it did not state facts sufficient to constitute a cause of action. The action was afterwards dismissed as to McCorkle. The other defendant, Tucker, answered by averring that on the ninth day of July, 1861, an action was commenced against Grigsby, in which an attachment issued, and on the tenth day of July it was levied on the premises in controversy ; that a judgment was afterwards rendered in said action, on which an execution issued, and the defendant Tucker, purchased the property at the Sheriff's sale, under the execution, on the thirtieth day of November, 1861 ; that he obtained a certificate of purchase from the Sheriff, and that the property had not been redeemed. The plaintiff in his replication to this answer, admits the indebtedness against Grigsby and the action thereon, and attachment therein, but avers that Grigsby, to secure the payment

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of one of the notes sued on pledged to the holder a certain promissory note, made by third parties, for \$1,206 66, and therefore avers that the attachment was illegal and void. The case was submitted to the Court upon the pleadings alone, and a judgment rendered for the defendant, from which the plaintiff appeals.

There is no statement or bill of exceptions in the case, and there is nothing properly before us but the judgment roll, and in this we see no error. Even if the plaintiff had a right to attack the attachment proceedings, in this form of action, or in any other mode, the pleadings presented an issue in which the burden of proof was upon him. To maintain his case it was necessary for him to prove that one of the notes sued on was secured in the manner alleged in his replication. Not having done this, the Court properly rendered judgment against him. The record discloses that the defendant Tucker, filed a demurrer to the replication, and there is also a copy of what purports to be an order sustaining "defendants' demurrer filed herein;" whether this applies to McCorkle's demurrer to the complaint, or Tucker's demurrer to the replication, the entry does not state; nor does it appear that the plaintiff excepted to this order. The action of the Court thereon cannot therefore be considered in the case.

The judgment of the Court below is affirmed.

BELL *et al.* v. BROWN *et al.*

SEVERAL defenses, inconsistent with each other, may, under proper circumstances, be set up in a verified answer.

In an action to recover a mining claim the complaint, duly verified, alleged title and possession in plaintiffs on a certain day. The answer, also verified, denied that plaintiffs ever had either title or possession, and afterwards averred that if plaintiffs ever had a title to the claim they had abandoned and forfeited it before defendants' entry. At the trial, on motion of plaintiffs, the Court ordered defendants to elect on which of the above defenses they would rely, and defendants having, after excepting to the order, elected to rely upon their denial were precluded from introducing proof of the abandonment and forfeiture: *held*, that the action of the Court was error; that defendants had the right to set up both defenses in their answer and support both by proof.

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The inconsistent defenses which are allowed to be pleaded in a verified answer are not such as require in their statement a direct contradiction of any fact elsewhere directly averred. They are those in which the inconsistency arises rather by implication of law, being in the nature of pleas of confession and avoidance as contradistinguished from denials, where the party impliedly or hypothetically admits, *for the purpose of that particular defense*, a fact which he notwithstanding insists does not in truth exist.

If a fact, which is directly averred in one part of a verified pleading, is in another part directly denied, whether it be in the statement of several causes of action in a complaint or of several defenses in an answer, the party verifying it is guilty of perjury, and on the trial that averment which bears most strongly against the pleader will be taken as true.

In an action of ejectment one of the material allegations of the complaint is that plaintiff was the owner and entitled to the possession *at the time of the alleged entry by defendant*, and under a direct denial of this averment the defendant may show that, previous to his entry, a title which once existed in the plaintiff had been lost by abandonment or forfeiture.

APPEAL from the Eleventh Judicial District.

The facts are stated in the opinion.

Hereford & Williams, for Appellants.

I. The Court erred in excluding the evidence offered by defendants to show that the plaintiffs had abandoned the claim sued for—had forfeited it—and that it was vacant and unappropriated at the date of defendants' entry. The defendants admitted their entry, but denied the title of the plaintiffs. The main and only question then to be tried was whether the plaintiffs were the owners at the date of the defendants' entry. If for any reason, whether from never having possession or from abandonment, the plaintiffs were not the owners or possessors of the land or claim at the date of defendants' entry, then they never had a cause of action. And we hold the rule to be well established, that under a denial of the right of the plaintiffs to recover—as for example his title or possession—anything may be given in evidence which goes to show that the plaintiffs never had a cause of action. (1 Van Santvoord's Pleadings, 2d ed. 461-470; 14 Barb. S. C. 541.)

II. The Court erred in compelling the defendants to elect between the defenses of denial of title and the plea of abandonment. The action of the Court was based upon the forty-ninth

section of the Practice Act, and the construction given it by this Court. There is nothing in the terms or import of that section which goes to the extent that the defendant may not plead inconsistent defenses. In the corresponding section of the New York Practice Act at one time a provision was inserted requiring the defenses to be consistent, which provision was subsequently stricken out leaving the law to stand in the condition it was in when we incorporated it with our system. The New York Courts, since the word "consistent" was stricken out, have held that the defendant may plead as many defenses as he has, whether consistent or not with each other, but that each plea must in itself be consistent.

This Court, however, has said "that a sworn answer should be consistent in itself, and should not deny in one sentence what it admits to be true in the next." (14 Cal. 509.) We respectfully submit that the point was not in that case strictly before the Court, was not argued, and was not necessary to the decision, and hence is not binding. Attention does not seem to have been directed to the language of the Practice Act. The error of the expression quoted is in using the term "answer" instead of "defense." If the Court had declared that each defense or plea must be consistent in itself instead of the broad statement that the whole answer must be so, then such declaration would have been consonant with the language and spirit of our Practice Act. While the Practice Act in New York required pleas to be consistent, it was held that "the defendant cannot set up two distinct defenses which are so inconsistent with each other that if the matters constituting one defense are truly stated, the matters upon which the other defense is attempted to be based must necessarily be untrue in point of fact. But the defendant may deny the allegations upon which the claim to relief is founded, and at the same time set up other matters not wholly inconsistent with such denial as a distinct or separate defense." (9 How. Pr. 289-291, and authorities there cited.)

The defenses set up in this answer were not so inconsistent as to bring them even within that rule. Our defense was that plaintiff did not own or possess at the date of our entry. We had a right to introduce all evidence proving that fact, and it would certainly be proved by evidence of abandonment. We cannot conceive it

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possible that two defenses, both sustained by the same proof, can be inconsistent with each other. (See 9 How. Pr. 289; 10 Id. 44; 11 Paige's Ch. 46; 1 Van Santvoord's Pleadings, 522, 523.)

S. W. Sanderson, for Respondents.

I. When the pleadings are verified, and there are separate defenses, such defenses must be consistent. In *Hensley v. Tartar et al.* (14 Cal. 508) this Court says: "But it is proper to say further that a sworn answer should be consistent in itself, and should not deny in one sentence what it admits to be true in the next. The object of sworn pleadings is to elicit the truth, and this object must be entirely defeated if the same fact may be denied and admitted in the same pleading." The same doctrine is fully recognized in *Klink and Wife v. Kohen & Silverstein* (13 Cal. 623), and it is there held that the proper remedy in such case is the one which was adopted here. There are no cases in this Court which conflict with the two above cited. The language of the New York Code is identical with that of ours. (4 Abbott's N. Y. Dig. 492, Sec. 321.) In that State there is some conflict, but the later and better doctrine seems to be as contended for by me. In *Arnold v. Dimon* (4 Sandf. N. Y., 680) it was held that a carrier by water could not be permitted to answer, 1st, that he was not the owner of the vessel; and 2d, that the property shipped was delivered to the plaintiff. In an action for slander the defendant cannot justify unless he expressly admit that he used the words imputed to him. (1 Chitt. Pl. 511; 1 Stark on Slander, 421; 7 East. 493; 11 Johns. 38; 6 How. Pr. 255, 84.) So held in libel. (*Buddington v. Davis*, 6 How. Pr. 401.) Where the answer puts an assault in issue, it cannot add a justification. (*Schneider v. Schultz*, 4 Sandf. 664.)

II. Inconsistent defenses are such as cannot all be true. The defenses in the present case cannot all be true. Abandonment and forfeiture are not inconsistent because both may be true, but both are inconsistent with the denial of title. A man cannot abandon or forfeit what he never owned or possessed. Abandonment and forfeiture are both pleas of avoidance and should, when properly pleaded, expressly confess that which they seek to avoid, to wit:

the title; but whether the admission be made in terms or not is immaterial, since it is necessarily implied.

III. Proof of abandonment and forfeiture could not have been admitted after those pleas were stricken out. Proof of forfeiture could not, because the rules under which the forfeiture is claimed must be specially pleaded. This was held in *Dutch Flat Water Company v. Mooney* (12 Cal. 534), and the doctrine of that case has never been departed from. Proof of abandonment could not, because the idea of abandonment is inseparable from that of possession. An admission of abandonment is necessarily and logically an admission of possession at the time the abandonment occurred, and any argument to the contrary of this can be neither more nor less than sophistry. The pretense that this testimony was admissible for the purpose of showing that plaintiff was not the owner or possessor at the time stated in the complaint is unfounded and without the color of authority. The allegation of the complaint is, "that heretofore, to wit: on the — day of August, 1861, and for a long time prior thereto, plaintiffs were the owners, etc.;" and the denial of the answer is as follows: "that they (defendants) deny that the said plaintiffs were on the — day of August, 1861, or at any time prior thereto or since the owners, etc." This is a full denial that plaintiffs at any time were the owners. Ownership is the only issue, and the idea of time is not embraced in that issue because time is immaterial. If they (plaintiffs) were ever the owners, they remained so forever after, so far as the defense in question (denial) is concerned. The only way by which ownership can be shown at a particular time is by proof of acts, circumstances, and conditions existing prior to that time; that the ownership continues is not matter of proof, but presumption. The issue is not therefore narrowed down to the particular day named, but embraces with that day all anterior time. The defense must therefore—as it does in express terms—embrace all anterior time, and can only be sustained by proof equally comprehensive and embracing all anterior time. Any thing which falls short of this necessarily admits a prior existence of the fact in issue. That proof of abandonment and forfeiture is not thus comprehensive is apparent, because a division of time at which ownership ceased and abandon-

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ment took place is necessarily implied. The idea that a defense which cannot be pleaded may be proved, is a novel one in jurisprudence.

IV. To allow answers like the one in question is to tempt defendants to the commission of perjury. Where one defense or the other must be false, perjury has been committed, and that perjury is encouraged and directly sanctioned by the Courts when they hold that such answers are admitted and allowed by the law of the land.

CROCKER, J. delivered the opinion of the Court—NORTON, J. concurring.

The complaint in this case was filed on the twenty-second day of September, 1862, was duly verified, and alleges that on the — day of August, 1861, the plaintiffs were the owners and in the quiet and peaceable possession of a quartz mining claim, describing it; that subsequently, and prior to the commencement of this action, and while said plaintiffs were the owners and in the possession of said claim, the defendants unlawfully entered thereon and ousted and dispossessed the plaintiffs therefrom, and have since retained the possession. To this complaint the defendants filed their verified answer: First—Denying that the plaintiffs were on the — day of August, 1861, or at any time before or since, the owners and in the possession of the mining claim described in the complaint, or that they ever entered into the same while the plaintiffs were the owners or in possession thereof, or that they ever ousted or dispossessed the plaintiffs therefrom. Second—That the claim was mineral land, on a part of the public domain, and they set forth the mining regulations in that mining district relative to the holding of claims, averring that on the — day of —, 1861, they entered upon, took up, and became seized and possessed of the claim, the same being then vacant and unoccupied, and have ever since remained in possession, and on the day aforesaid they became and ever since have been the owners of the claim; that a dispute arose between the parties to this action concerning the title to the claim, which was submitted to arbitrators, who awarded part to the plaintiffs and part to the defendants, to which the parties assented,

and each took possession of the portion awarded to him; that if the plaintiffs ever had any title to the claim, they, prior to the commencement of the suit, abandoned and disclaimed the same, and forfeited it, by reason of not complying with the mining regulations of the district—setting forth the rule violated, and how it had been violated by the plaintiffs; that defendants have been in possession, under the arbitration, for more than one year, and have expended a large amount of labor and money in developing the claim, with plaintiffs' full knowledge and assent. An injunction was granted at the time of filing the complaint. A trial was had, and the jury found a verdict for the plaintiffs; a new trial was moved and denied, and the defendants appeal from the judgment and the order refusing a new trial.

The plaintiffs moved to strike out portions of the answer, and that the defendants be required to elect between the defense of the denial of the plaintiffs' title and possession, and the defenses of voluntary abandonment and forfeiture by reason of non-compliance with the mining regulations, which motion was sustained by the Court, and the defendants excepted, and then elected to stand upon the defense of the denial of the title of the plaintiffs. During the trial the defendants also offered testimony in support of the defenses stricken from the answer, which was ruled out, and they excepted.

The appellants allege that the Court erred in compelling them to elect between the several defenses set forth in their answer, and also in rejecting their testimony upon those portions of the answer not included in the denials of the plaintiffs' title; and, on the contrary, the respondents contend that the rulings of the Court were correct, because those portions of the answer were inconsistent with and contradictory of the denials.

Sec. 49 of the Practice Act is as follows: "The defendant may set forth by answer as many defenses and counter claims as he may have. They shall each be separately stated, and the several defenses shall refer to the causes of action which they are intended to answer in a manner by which they may be intelligibly distinguished." This section applies to all answers, verified and unverified. It does not attempt to make any distinction between the two, or to make any rule which does not apply equally to both.

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The right to set up numerous defenses in a suit is equally as important to the defendant in the one case as the other. It is an absolute right given him by law, and the principle is as old as the common law itself. He may fail to prove one defense by reason of the loss of papers, absence, death, or want of recollection of a witness, and yet he ought not thereby to be precluded from proving another, equally sufficient to defeat the action. In many cases it would be a denial of justice if a defendant should be shut out from setting up several defenses.

There is this difference, however, between verified and unverified pleadings, that if the truth of a fact is directly averred in any part of the former, whether in a complaint or answer, and then in any other part of the same pleading, whether in the statement of several causes of action in the complaint, or separate defenses in the answer, the same fact is directly contradicted or denied, the person verifying it is guilty of perjury, for both cannot be true; and the averment which bears most strongly against the party so pleading will be taken as true upon the trial. But there are numerous cases, and they are the most frequent in practice, where the averments are not directly contradictory; and if they can properly be considered as conflicting at all, it is only by implication of law. As, for instance, such defenses as set-off, counter claim, discharge in insolvency or bankruptcy, the statute of limitations, and the like, in which matters in avoidance of the plaintiffs' claim are set up, when coupled with a denial of the plaintiffs' cause of action. In a legal sense, such defense admits, so far as that defense is concerned, that the plaintiff had a cause of action, but that it has since been satisfied, discharged, or barred in the manner set forth. A defendant, sued upon an alleged contract, might very properly deny under oath that he ever made the contract, and at the same time plead one or more of these defenses, and it would oftentimes be very unjust to preclude him from so doing. It may be true that he never did make the contract, and as an honest man he could only deny it; and yet the plaintiff might be able, by perjured testimony, to prove that he did make it: or the fact may be that it was made when he was insane, or helplessly drunk, or under duress, which would show that it was not his contract, and yet he might not be

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able to prove those facts. It would be gross injustice if, because the defendant conscientiously denied the contract, he should be thereby precluded from showing a full discharge in insolvency or bankruptcy, or that the demand was barred by the Statute of Limitations. In cases where such defenses are set up, the law treats them as in the nature of pleas of confession and avoidance, as contra-distinguished from the general issue or denials of the averments of the complaint, and it is assumed that, for the purposes of that particular defense, the allegations of the complaint are admitted. It is similar to the rule in the case of a demurrer, which is taken as an admission of the truth of the facts stated in the pleading, against which it is interposed for the purposes only of the argument upon the demurrer. Yet, because the demurrer has been filed to a verified complaint, it is never treated as an admission by the party demurring of any fact in any subsequent proceeding in the action. In both cases it is but an admission implied by the law and not admitted or intended to be admitted in fact. There may be, and no doubt often are cases, where parties make reckless statements in verified pleadings, not only inconsistent, but directly contradictory of each other. In such cases, Courts ought to deal severely with the parties, and yet it ought not to be carried so far as to prevent parties from setting up separate defenses—a right plainly secured by the statute.

The question of inconsistent defenses and hypothetical pleadings under the code has been adjudicated by the Courts of other States in numerous cases, and the right of a defendant to set forth as many defenses as he thinks proper is fully recognized, and also that pleading one defense cannot be held a waiver of another in the same answer, even though inconsistent. In *Sweet v. Tuttle* (4 Kern. 465), *Mayhew v. Robinson* (10 How. Pr. 162), and *Bridge v. Payson* (5 Sandf. 210), a general denial and plea of nonjoinder of defendants were united and held good. So in *Gardner v. Clark* (21 N. Y. 399), where a plea of performance and a former action pending were joined. So in *Doran v. Dinsmore* (20 How. Pr. 503), where a general denial was coupled with a plea of payment. So in *Mott v. Burnett* (2 E. D. Smith, 52), it was held that the defendant might deny making the note sued on, allege a

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set-off, and that one of the makers of the note had been discharged by the holder. In an action to recover personal property it was held the defendant might answer by a general denial and set up a justification of the taking. (*Harkley v. Ogmun*, 10 How. Pr. 44.) In slander, that he may deny the charge and also justify. (*Ormsby v. Douglas*, 5 Duer, 665; *Butler v. Wentworth*, 17 Barb. 649; 9 How. Pr. 282.) So also that pleas which were not inconsistent under the former practice are good as answers under the code. (*Lansing v. Parker*, 9 How. Pr. 288.) Held, too, that a defendant should never be required to elect between a denial of a material allegation of the complaint and new matter constituting a defense (*Hollenbeck v. Clow*, 9 How. Pr. 289); and that it was not necessary that the several defenses in an answer should be consistent with each other. (*Stiles v. Comstock*, 9 How. Pr. 48.) Also, that denials of allegations in the complaint may be coupled with a defense of the Statute of Limitations. (*Ostrum v. Bizby*, 9 How. Pr. 57.) Held, too, that a defense might be hypothetically predicated upon a fact alleged in the complaint, as an answer after denying that the plaintiff was the owner of the note sued on, averred that if the plaintiff is the owner, he took it with notice of a failure of the consideration (*Brown v. Ryckman*, 12 How. Pr. 313); or if the defendants, by their agents, ever issued the certificate of deposit sued on, the same has been paid. (*Doran v. Dinsmore*, 20 How. Pr. 503.) Also held that an implied admission in one of the defenses set up in an answer will not conclude or estop the defendant from proving another defense set up in the same answer, as each defense in an answer stands by itself, and an admission in one is not available against the others. (*Swift v. Kingsley*, 24 Barb., S. C., 541.) In the case of *Ketchum v. Zereiga* (1 E. D. Smith, 553), this question was very fully examined, and the right of a defendant to file inconsistent defenses and hypothetical pleadings, under proper circumstances, was fully maintained.

In the case of *Youngs v. Bell* (4 Cal. 201), the right of a defendant to set up several distinct defenses, and to rely upon all of them in order to put the plaintiff to his proof, was sustained, and it was held that he was not concluded by one plea so long as

he had others which went to the whole action. (See, also, *Kidd v. Laird*, 15 Cal. 182.)

We are aware that there are several decisions, both in our own and other Courts, which have laid down contrary views, but the weight of principle and authority is in favor of the rule, that under proper circumstances a defendant may set up several defenses in his answer, inconsistent with each other, though each defense must be consistent with itself. The cases decided by the Court of Appeals in the State of New York, and reported in 4 Kernan, 465, and 21 N. Y. 399, seem to have settled the rule in that State. The view we take harmonizes the new code with the well-established principles of the old system of practice. Works on pleading are full of precedents and forms recognizing fully the right of a defendant to file several pleas, which, though they might be inconsistent with each other, were required each to be consistent with itself.

There is another class of cases where facts set up in answers are apparently in the nature of pleas of confession and avoidance, but which, when carefully examined, are found to be but amplified statements, amounting substantially to a denial of one or more allegations of the complaint; that is, setting forth particular facts which show that some one or more allegations of the complaint are not true. They are like special pleas in the nature of the general issue, under the old system of practice. The present case we consider one of that kind. One material allegation in the complaint is that the plaintiffs, at the time of the alleged entry of the defendants, were the owners and in possession of the mining claim sued for; and another is that the ownership and right of possession remained in the plaintiffs up to the commencement of the action. The defendants deny these allegations in direct and positive terms, and then proceed and amplify those denials, by alleging facts of previous abandonment and forfeiture, which, if true, would sustain the general denial. The material and issuable fact was, not that the plaintiffs months or years before were the owners and in the possession of the claim, but that such was the case at the time of the entry of defendants; and even if the specific facts of abandonment and forfeiture had not been set forth in the answer, the defendants clearly had a right to prove them, in support of the general denial

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in their answer. It may be that the defendants were not justified in saying that the plaintiffs never had been the owners or in the possession of the claim, yet it might still be true that they were not the owners or in the possession at the time of the entry by defendants. Because they were mistaken as to an immaterial fact, they should not be precluded from proving the material fact in issue, by any legal evidence supporting their denial. The proof of abandonment and forfeiture of the property by the plaintiffs, prior and up to the time of the entry, was direct evidence in support of the general denial. We cannot see how the plaintiff was injured by having these facts fully set forth in the answer. It advised him of the character of defendants' proof upon the main point in issue, and to that extent it was a benefit to them. The Court erred in compelling the party to elect, and in excluding the evidence of abandonment and forfeiture.

The judgment is therefore reversed, and the cause remanded for further proceedings.

INDEX.

ABANDONMENT.

1. The right which a party acquires to public land by possession and occupancy may be lost by abandonment. An abandonment divests the title as fully as a conveyance. *Gluckauf v. Reed*, 468.
2. An abandonment of a possessory right to land may be inferred from disuse and cessation of occupancy. *Id.*
3. The rule that a party by failing, under certain circumstances, to assert his title to property is thereby estopped from saying that he had title, does not extend so far as to debar him from asserting an *after-acquired* title. *Id.*
4. Where the defendant in an action of ejectment relies upon an abandonment by plaintiff of a title once held by him and a subsequent taking of possession by himself, the rules of law relating to adverse possession, have no relevancy, whatever may have been the relation of defendant to the title claimed to have been abandoned. *Id.*
5. The abandonment destroys the title and all its relations, and the subsequent possession of defendant is a new and independent right. *Id.*

ACTIONS, TRANSFER OF.

See EJECTMENT, 10.

AGENT.

1. F., while employed as boat captain by the defendant, a corporation, subscribed for its stock to the amount of \$2,000, and shortly after advanced to the company eight hundred and twenty dollars upon a verbal condition that if he should be retained in his position as captain the money should be applied on his stock subscription; but otherwise should be considered a loan, and repaid. F. was soon after discharged from the employment, and then assigned his demand to plaintiff: *held*, that plaintiff was entitled to recover of defendant the amount advanced as money had and received. *Allen v. Citizens' Steam Navigation Co.*, 28.
2. The authority of an agent of a private corporation to bind it by a contract for

borrowing money may be shown without proof of a resolution of the Board of Trustees directly conferring the authority, or of any formal ratification by them of the contract. It may be inferred from proof of the character of the agency, of the acts of the agent, and the knowledge of the officers and directors of his habit to make similar contracts and their acquiescence in the same, and the fact of the money being applied to the use of the corporation. *Id.*

ALIENS.

1. An alien does not become a citizen of the United States by filing his declaration of intention to become a citizen. He does not acquire the full rights of a citizen until he has taken the final oath of citizenship. *Orosco v. Gagliardo*, 83.
2. The United States Courts have no jurisdiction, based upon the citizenship of the parties, over actions between aliens and aliens, but only over actions between citizens and aliens. *Id.*
3. Under the Act of Congress of 1789 and the statute of this State of 1855 respecting the transfer of actions from a State to a United States Court, the Court to whom the application is made must, before granting it, be satisfied that the application is founded upon facts which entitle the applicant to the order, and for this purpose has the right to inquire into the truth of the facts set forth in the petition as well as to investigate the sufficiency of the security. *Id.*

See EJECTMENT, 10.

AMENDMENTS.

1. Amendments to pleadings should be allowed liberally, and the discretion of the Court below in permitting them will rarely be revised. *Pierson v. McCahill*, 127.
2. Thus, where a judgment in favor of defendant had been reversed by the Supreme Court on the ground that certain material evidence which had been received in his favor was inadmissible under his answer, and on the second trial defendant moved to amend his answer by inserting averments of new matter obviating the objection: *held*, that as the amendment was evidently necessary to enable the defense to be fully presented, it was properly allowed by the Court. *Id.*
3. The fact that new matter set up by an amendment was well known to the defendant at the time he filed his original answer, is no good reason why the amendment should not be permitted. *Id.*
4. The granting of time to file counter affidavits on a motion to change the place of trial is a matter of discretion in the lower Court and will not be reviewed on appeal. *Id.*
5. The granting or refusing of a motion to change the venue on the ground of convenience of witnesses is discretionary with the trial Court, and subject to review only in cases of abuse. *Id.*
6. Where a change of venue is asked by defendant on the ground of his residence, if the convenience of witnesses requires that the action should be retained for

trial in the Court where it was commenced, the plaintiff should present that fact in opposition to the motion, and if he neglects to do so, it is doubtful whether he can afterwards apply to the Court to which it has thus been removed, to have it sent back again. *Id.*

See PLEADINGS, 6.

APPEAL.

1. A plaintiff cannot appeal from a judgment of nonsuit rendered on his own motion. *Sleeper v. Kelly*, 456.
2. Where the notice of appeal from an order overruling a motion for new trial has not been filed within sixty days from the entry of the order the appeal will be dismissed. *Towdy v. Ellis*, 650.
3. An acknowledgment of service indorsed on a notice of appeal as follows: "Due service of a copy of the within notice is hereby accepted to have been made this twentieth day of February, 1863," is no waiver of an objection that service upon the day mentioned is too late. *Id.*
4. Any statement agreed to by the parties or duly settled and certified by the Court becomes a part of the record the same as a bill of exceptions, demurrer to evidence, or any other mode by which questions of law or matters of evidence were made part of the record by the old system of practice. *Id.*
5. An appeal was taken from a judgment and also from an order overruling a motion for new trial, and the appeal from the order was dismissed for the reason that the notice was not served in time. The transcript contained a statement on motion for new trial, but no statement on appeal or bill of exceptions: *held*, that on the appeal from the judgment the statement on motion for new trial properly formed part of the record, and might therefore be used in this Court, and that any alleged errors appearing therefrom affecting the judgment might be considered and passed upon. *Id.*
6. Whenever a matter of law or evidence is made a part of the record by a proper statement or bill of exceptions, whether such statement be filed on motion for new trial or on appeal, it is, if embodied in the transcript, on appeal, properly before the Appellate Court, and can be used by it to review the action of the Court below. *Id.*
7. If, on appeal from a judgment, the transcript contains a statement on motion for new trial which shows error occurring prior to or in the rendition of the judgment, and affecting its validity or the validity of any action of the Court prior thereto, the errors thus disclosed may be reviewed, and the judgment reversed therefor. *Id.*
8. A denial that property sued for is of the exact value alleged in the complaint is an admission of any lesser value. *Id.*
9. It having appeared that there was an agreement in writing respecting the transfer of certain goods from witness to K., counsel proposed to ask witness "how K. got the goods:" *held*, that the question was improper, the writing being the best evidence. *Id.*
10. Where, in an action against the Sheriff for taking goods, he justifies under an

attachment against a third person, it is not necessary that his answer should set forth minutely every fact relating to the attachment suit. An answer which stated the time of commencement of the action, the names of parties, the Court, and that the goods were taken by virtue of a writ of attachment issued therein, held to be sufficient. *Id.*

11. In trespass for taking goods against a Sheriff who justified under a writ of attachment against a third person, he called as a witness his deputy, who stated that he served the attachment, and related certain conversations between himself and the plaintiff. On cross-examination he stated that "he was Deputy Sheriff, and under bonds to the Sheriff." Whereupon plaintiff moved to strike out his testimony on the ground of interest: *held*, that the motion was properly denied, as from the answer it was not certain that the character of his bonds was such as to make him interested. *Id.*
12. *Held*, further, that the plaintiff having testified, the deputy, even if interested, was a competent witness under Sec. 422 of the Practice Act. *Id.*
13. An objection that a judgment in favor of defendants is improper because of the absence of any prayer for relief in the answer must be taken in the trial Court or it will not be considered on appeal. *Id.*

See NEW TRIAL, 2; TRANSCRIPT; INJUNCTION, 1; EJECTMENT, 11, 16; PRACTICE, 2, 3; HOMESTEAD, 1.

ASSIGNOR AND ASSIGNEE.

1. A cause of action for a malicious prosecution is not assignable. *Lawrence v. Martin*, 173.
2. The recovery of a verdict in an action for a personal tort does not change the character of the claim to a debt which can be assigned. *Id.*
3. Costs are only an incident of a verdict, and when the verdict is, from its nature, unassignable, an attempt to assign it will not pass the costs. *Id.*
4. A judgment rendered upon an unassignable cause of action for a tort is a debt. *Id.*
5. In an action for malicious prosecution the plaintiff, after a verdict in his favor and before judgment, assigned the cause of action and verdict. Judgment having been subsequently entered, defendant was garnisheed under three executions issued on other judgments against the plaintiff, and paid to the Sheriff the amount of the judgment in favor of plaintiff against him, who applied the same upon the executions: *held*, that the assignment was void, and that the payment by defendant to the Sheriff was a satisfaction of the judgment. *Id.*

See FRAUDS, STATUTE OF, 5.

ASSISTANCE, WRIT OF.

1. A Deputy Sheriff may, after the expiration of the term of office of his principal and in the absence of the latter from the State, execute a deed to the purchaser at a judicial sale, made by the Sheriff while in office. The authority of the deputy is not impaired by the Act of 1858, allowing the deed in such cases to be executed by the succeeding Sheriff. *Mills v. Tukey*, 373.

2. Under the fifth section of the Act of April 3d, 1858, providing for the collection of delinquent taxes in Sacramento, the purchaser at a tax sale made in pursuance of the act, is entitled to a writ of assistance against the person in possession of the premises, notwithstanding the existence of such fiduciary relations between the parties at the time of the sale, that a Court of Equity would hold the purchaser a trustee for the possessor in the purchase, on the ground of constructive fraud. *Id.*
3. As a general rule, neither a tenant in common, nor a mortgagee, can acquire a tax title and set it up as against his co-tenant or mortgagor, but this rule rests upon the doctrine of constructive frauds, and is not applicable in a case where, by statute, the deed can only be attacked for actual fraud. *Id.*

ATTACHMENT.

See PLEADINGS, 17.

ATTORNEY.

1. The Act of April 25th, 1863, requiring attorneys at law and litigants to file affidavits of allegiance to the Government of the United States as therein prescribed, is constitutional. *Cohen v. Wright*, 293.
2. Sec. 3 of Article 11 of the Constitution, containing the form of oath to be administered to State officers, does not prohibit the Legislature from prescribing an oath to such officers in a different form of words from that therein used, if the meaning, object, and intent of the section be not violated. *Id.*
3. An attorney at law is not a person holding an "office of public trust," within the meaning of those terms as used in the prohibitory clause of Sec. 3, Art. 11, of the Constitution. *Id.*
4. The right to practice law is not a natural or constitutional right, but a statutory privilege, subject to the control of the Legislature. The exclusion of an attorney by a test oath is not in the nature of a punishment for a criminal offense, but a denial of a privilege forfeited by failure to comply with a prerequisite condition. *Id.*
5. Courts without any special statutory provision may strike from the rolls an attorney guilty of disloyalty or treasonable acts, under their general power of supervision over the morality of their own officers. They may also require an attorney to whom such offense is imputed, to purge himself therefrom by his own oath. *Id.*
6. The right to practice law is not "property," nor in any sense a "contract," within the constitutional meaning of those terms. *Id.*
7. Courts cannot declare a law void, upon the ground that it is contrary to "the spirit and policy of the Constitution," unless it is at variance with some express or clearly implied provision of that instrument. *Id.*
8. The payment by a lawyer, of a United States license tax, imposed by the Revenue Law of 1862, does not entitle him to practice his profession without taking the oath prescribed by the State law. *Id.*
9. There is nothing in the Constitution which prohibits the Legislature from clos-

ing the doors of the Courts against traitors and their aiders and abettors, or which requires that this shall not be done until after conviction of the crime in a regular criminal trial; or which prohibits the Legislature from requiring of those litigating in the Courts, that they shall purge themselves by their own oath of the imputed offense before they shall claim their aid. *Id.*

10. The citizen cannot demand protection from the Government without he renders to it the equivalent of obedience and support. When he refuses this obedience and support, and aids, assists, countenances, or encourages those who are struggling to overthrow the Government, he forfeits all right to the use of its Courts. *Id.*
11. The State may exclude from its Courts those who are guilty of disloyalty to the nation of which the State is a part, as well as those disloyal to the State Government directly. *Id.*
12. The Act of April 25th, 1863, requiring from litigants an oath of allegiance, operates not upon the right of action but upon the remedy alone, which is subject to legislative control, and the act does not so burden the remedy as to render it useless or impracticable. *Id.*

BILLS OF EXCHANGE.

1. A person not previously a party to a bill of exchange who, for a consideration, accepts the same, incurs thereby the liabilities of an acceptor equally as if he were the drawee. *Kelly v. Lynch*, 661.
2. Where one, not the drawee, accepted a draft for the sole purpose of protecting the interest of his foreign correspondent in a bill of lading accompanying the draft as collateral security, and took at the time an assignment of this bill of lading: *held*, that although the collateral security turned out to be of little value, its receipt was a legal consideration for the acceptance. *Id.*
3. It is a sufficient consideration for the acceptance of a draft by one not a party to the paper, that the payee thereby loses the acceptance of the drawee. *Id.*
4. Inducements, not amounting to fraud, held out by the payee of a draft to procure its acceptance, do not invalidate the contract of the acceptor. *Id.*

CERTIORARI.

See JUSTICES OF THE PEACE, 7.

COMMON CARRIER.

1. A ferryman who takes charge of a team driven upon his boat and directs an attempt to cross the stream, is liable as a common carrier for any loss that ensues in consequence of his negligence in the outfit or management of his boat, notwithstanding that the team was driven upon it at a time of peculiar danger and contrary to his express order. *Griffith v. Cave*, 534.
2. In an action against a common carrier for negligence, evidence of a rule qualifying his duties under peculiar circumstances is inadmissible without first showing that the rule was known to the plaintiff either directly or constructively. *Id.*

CONSTITUTIONAL LAW.

1. The Act of April 25th, 1863, providing for a subscription by the City and County of Sacramento to the capital stock of the Central Pacific Railroad Company, upon a vote by the electors of the county in favor of the proposition, is in its main features constitutional, and authorizes the making of the subscription and issuance of bonds as therein directed. *Robinson v. Bidwell*, 379.
2. The tenth section, exempting the city and county from liability for the debts of the company, if it be unconstitutional (a point not decided) is not so essentially connected with the scope and object of the act as to invalidate its other provisions. *Id.*
3. Where a provision of a statute is of such a nature and has such a connection with the other parts as to be essential to the law, its unconstitutionality vitiates the whole enactment. But if an independent provision, not in its nature and connections essential to the law, be unconstitutional, it may be treated as a nullity, leaving the rest of the enactment to stand as valid. *Id.*
4. Even where an invalid provision in a statute is in the nature of a condition to the main purpose of the law, its invalidity will not necessarily invalidate the whole law if the remaining provisions are sufficient to effect that main purpose. *Id.*
5. Where a law is passed providing that certain acts shall be done upon the contingency of a vote of the electors of a district, the vote upon such proposition is not an act of legislation, but simply an event, upon the happening of which the law is to take effect. *Id.*
6. In determining the constitutionality of an act which was to take effect, upon a vote of the people in its favor, it is not material to inquire whether an unconstitutional provision therein was so important, in the view of the voters, that, if its invalidity had been known to them, they would not have sanctioned the law. *Id.*
7. The proposed Central Pacific Railroad, leading from the City and County of Sacramento to the eastern portion of the State, is so far a public improvement, and sufficiently for the apparent interest of the city and county, that a law authorizing the municipality to become a stockholder in the railroad corporation is not unconstitutional as imposing a tax upon a local community for an improvement in which it has no peculiar interest. *Id.*
8. Per CROCKER, J.—Persons dealing with a corporation have the right to waive, by special contract or in any other proper mode, all claim upon the personal liability of the stockholders, or to limit or qualify the extent of that claim. The fact that such claim is founded upon a constitutional provision, can make no difference. *Id.*
9. A party may waive a constitutional as well as a statutory provision made for his benefit. *Id.*
10. How far the Legislature may, under the thirty-second and thirty-sixth sections of Art. 4 of the Constitution, regulate the individual liability of stockholders in a corporation, discussed and held open for future decisions. *Id.*

11. Nothing in our State Constitution prohibits the Legislature from declaring the Mayor of a city to be, *ex officio*, a Justice of the Peace, and under such a law the same person may constitutionally exercise the functions both of Mayor and Justice. *Uridias v. Morrill*, 473.
12. The express permission, in Sec. 1, Art. 6 of the Constitution, to establish *Municipal Courts* is within the exception to Art. 3 respecting the division of powers in the Government. The term "*Municipal Courts*" has a legal meaning, and includes Mayors' and Recorders' Courts. *Id.*
13. The Constitution not having defined the jurisdiction of the *Municipal Courts* authorized to be established, it is left to be regulated by the Legislature under its general powers. These powers are not exceeded by conferring upon a Mayor the authority and jurisdiction of a Justice of the Peace. *Id.*

See ATTORNEY; FRANCHISE, 1.

CONSTRUCTION OF STATUTES.

See ESTATES OF DECEASED PERSONS, 1, 2.

CONTINUANCE.

See CRIMES AND PUNISHMENTS, 6.

CONTRACT.

1. The defendant, by a written contract, agreed to pay the assignors of the plaintiff five hundred dollars whenever they should secure a final decree of the Supreme Court in any of the cases now pending, or hereafter instituted, in which the "*Sisters*" (referring to the daughters of one Peralta, deceased), claim adversely to the title under the will (of Peralta), which shall declare the said sisters' title null, and that the title of the "*Peralta Sons* is the only valid title under the will." An ejectment case was then pending on appeal, in the Supreme Court, for a portion of the land devised by Peralta, in which the plaintiff's assignors, acting as attorneys, procured a decision that the plaintiff therein, who claimed under the "*Sisters*," had no title, and that the defendant therein, who claimed through the sons, *under the will*, had a title which was valid: *held*, that this decision was a compliance with the condition of the agreement, and entitled plaintiff to recover the five hundred dollars. *Mathewson v. Fitch*, 86.
2. If A promises B to pay him a sum of money if he will do a particular act, and B does the act, the promise thereupon becomes binding, although B at the time of the promise does not engage to do the act. *Id.*
3. Where a complaint avers that plaintiff did certain work in consideration of a promise by the defendant, an answer denying that plaintiff did the work, but not claiming that it was done upon any other consideration than the promise, raises no issue, except as to the performance of the work, and requires no proof from plaintiff as to the consideration upon which it was performed. *Id.*
4. The offense of Maintenance is unknown to the laws of this State. *Id.*
5. Any contract by a public officer which interferes with the unbiassed discharge of his duty to the public in the exercise of his office, is against public policy and void. *Spence v. Harvey*, 336.

6. A postmaster is a public officer, and in the discharge of his trust is bound to exercise his judgment for the public benefit in fixing the location of his office, and any contract by which this exercise of his judgment is sold for his private emolument, interferes with the discharge of his official duties and is therefore void. *Id.*
 7. The question of the validity of a contract of a public officer does not depend upon the circumstance, whether it can be shown that the public has in fact suffered any detriment, but whether the contract is such in its nature as might have been injurious to the public interest. *Id.*
 8. The plaintiff in expectation of receiving a commission as postmaster entered into an agreement with defendants, whereby they leased to him certain premises for the term of one year, with the right on his part to extend the terms so long as he should remain postmaster not exceeding four years, in consideration of the sum of one dollar per year, and a covenant on his part, that as soon as he received his commission he would remove the post-office to the leased premises, and continue the same there for all the time that he should hold the office: *held*, that, in an action for the breach of this contract by defendant, it contravened public policy and was void. *Id.*
 9. If in order to secure a fit location for an office it should be necessary for a postmaster to agree to locate and continue it at a particular place, a contract to that effect might be valid, but to maintain an action thereon such necessity would be required to be affirmatively shown. *Id.*
- See AGENT, 1; PROBATE COURT, 5, 6; MORTGAGE, 15, 16; WORK AND LABOR, 2; LIENS, 3-5.

CORPORATION.

1. Where the meaning of a written instrument is doubtful, extrinsic evidence may be resorted to for the removal of the doubt, but such evidence is not admissible to show that the effect of the instrument is different from that which its terms plainly and unequivocally denote. *Richardson v. Scott River W. & M. Company*, 150.
2. Where a bond, made in connection with a mortgage to secure the debt of a corporation was signed by four persons, who neither described themselves as agents of the corporation, nor designated anywhere therein the corporation as the party intended to be bound: *held*, that the instrument was upon its face the personal obligation of the parties signing, and that extrinsic evidence of their official character or of their intentions was inadmissible for the purpose of showing it to be the bond of the corporation. *Id.*
3. A conveyance of real property by a corporation must be under its corporate seal. It may alter its seal at pleasure, and may adopt as its own the private seal of an individual, but in the latter case the seal adopted must be used as that of the corporation. *Id.*
4. If to a deed, purporting to be that of a corporation, a seal be affixed as that of the individual agent who signs it, such seal cannot be treated as that of the corporation. A declaration in the instrument that the seal is affixed as that of the agent is conclusive of its character and effect. *Id.*

5. It is not necessary to state in a conveyance by a corporation that the seal used is that of the corporation. This fact may, in the absence of any declaration to the contrary, be presumed from the language of the conveyance or proved by evidence *aliunde*. *Id.*
6. A mortgage, made in connection with a bond to secure the debt of a corporation, styled the Scott River Water and Mining Company, named as parties of the first part (grantors), W. P. Pool, C. W. Tozer, G. T. Terry, and J. Reid, "President, Directors, and members of the Scott River Water and Mining Company," and concluded as follows: "In witness whereof, the said parties of the first part hereunto set their hands and affix their seals," followed by the signatures of the four persons above named with a seal or scrawl affixed to each: *held*, that this conveyance was not sealed with the corporate seal, and was therefore inoperative as the foundation of any right or claim to the corporate property which it purported to convey. *Id.*
7. An act for the incorporation of water companies, approved April 22d, 1858, provided that the mode of proceeding for the appropriation of lands should be the same as that prescribed in Secs. 27-29 of the Act of April 23d, 1853, for the incorporation of railroad companies. In 1861, an entirely new act for the incorporation of railroad companies was passed, not following the order or number of sections of the Act of 1853, which it entirely repealed, and containing new provisions as to their appropriation of lands. In a proceeding to condemn lands, instituted in 1862 by the plaintiff, by a water company incorporated under the Act of 1858: *held*, that the course of procedure prescribed by Secs. 27-29 of the Railroad Act of 1853 should be followed, and not those of the new Act of 1861—that those sections were substantially incorporated in the Water Company Act of 1858, and remained a part of the latter, notwithstanding the repeal of the original act. *Spring Valley Water Works v. San Francisco*, 434.
8. The existence of a corporation formed under the general State law is proved by its articles of incorporation executed and filed in accordance with the statute. *Id.*
9. In incorporating under the general law a strict compliance with all the requirements of the statute is not essential, and the proceedings will not be held invalid for slight defects or omissions. *Id.*
10. The omission or irregular performance of acts relating to the organization of a corporation, can only be investigated in a direct proceeding instituted by the State for that purpose, and not in a collateral action. So, too, of those acts which are not made prerequisites to the exercise of corporate powers but which operate as a forfeiture. *Id.*
11. Where an act authorized the incorporation of a water company, and also provided that 3,000 feet of water pipe should be laid down within one year: *held*, that the laying of the pipe within the period mentioned was not a condition of the existence of the corporation, nor was proof of it necessary to enable the corporation to maintain an action or proceeding after the expiration of the year. *Id.*
12. The rule that in order to complete the creation of a corporation the charter

- must be accepted by those incorporating, has no application to corporations formed under general laws. *Id.*
13. Where a law is passed for the special benefit of a party, his acceptance of it will be presumed. *Id.*
14. Where a franchise was granted to an individual and his associates and assigns, and the same act contained a provision requiring the individuals to incorporate themselves within a given time: *held*, that there was no need of any assignment from the individuals to the corporation—that the franchise by operation of law vested in the corporation as soon as it was formed. *Id.*
15. In a proceeding to appropriate lands under the railroad law, the commissioners are not required to determine questions of title, nor to report the amount of compensation to which each of several claimants of the same tract is entitled.. It is proper for them to report a gross sum as compensation for the tract, leaving the County Judge to distribute it among the several owners. *Id.*
16. The view of the premises required to be made by the commissioners in condemning lands under the Water Company Act of 1858, may be made by them at any time before submitting their estimate and report. It is proper that the view should be had before hearing the evidence. *Id.*
17. A mortgage given to secure a debt for the payment of which there is no written agreement, is a contract "founded upon an instrument of writing" within the meaning of the Limitation Act, and an action for its foreclosure may be maintained at any time within four years from its breach, notwithstanding that the statute has in the meantime run against the debt. *Union Water Co. v. Murphy's Flat Fluming Co.*, 620.
18. A corporation, unless expressly prohibited by law or the provisions of its charter, has power to make all contracts that are necessary and usual in the course of the business it transacts as means to enable it to effect the object of its creation. *Id.*
19. A contract by a corporation, which is not upon its face necessarily beyond the scope of its authority, will, in the absence of proof, be presumed to be valid. *Id.*
20. A loan of money upon mortgage security by a corporation organized for the purpose of constructing ditches for the conveyance and sale of water is not necessarily an act exceeding its corporate powers. Such contract, if necessary to attain its general objects and made as an incident to the exercise of its granted powers, is valid. In the absence of proof, its validity will be presumed. *Id.*
21. In an action by a corporation upon a contract made by it with the defendant, the latter cannot interpose as a defense that the plaintiff in making the contract has exceeded the power conferred by its charter or the law under which it was formed. The question of a violation of its charter is one between the State and the corporation, and cannot be investigated collaterally by individuals. *Id.*
22. A mortgage upon a flume or ditch not completed but projected and in process of construction, covers the whole work when completed, if apt terms expressing that intent are used in the instrument. *Id.*

23. A flume for the conveyance of water is in the nature of real estate, and a mortgage upon it will, without any special provisions, include all improvements then upon the line of the work; and also all those which may afterwards be put thereon. *Id.*
24. A decree foreclosing a mortgage and barring the equity of a subsequent mortgagee made a party defendant, should direct that the surplus proceeds of the sale after payment of the amount due upon the first mortgage, be applied upon the claim of the junior mortgagee. *Id.*
25. A judgment will not be reversed for an error therein which the record enables the Appellate Court to fully correct. *Id.*
26. The judgment will be modified and affirmed. *Id.*

See AGENT, 1; FRANCHISE, 3, 4; VENUE, 1, 2; WORK AND LABOR, 3-5.

CRIMES AND PUNISHMENTS.

1. Upon a challenge to a juror, in a capital case, for implied bias, he stated that he had formed an opinion as to the guilt or innocence of the defendant, but that it was not an unqualified opinion, and was rather in the nature of an impression than any fixed conclusion: *held*, that the challenge was properly overruled. *People v. Symonds*, 348.
2. The mere fact that the jury in a criminal case separate without permission of the Court, does not require that a new trial should be granted. The presumption that the jury may have been subject to improper influences which attaches to the fact of such separation may be removed by an affirmative showing that no injury to the defendant resulted therefrom. *Id.*
3. A new trial will not be granted because some of the jurymen, in a criminal case, may have conversed with third persons while deliberating upon their verdict, if it be shown that such conversations were innocent. *Id.*
4. Upon trial under an indictment for murder, it is no ground of objection to a witness being sworn and examined for the prosecution, that his name was not indorsed upon the indictment. *Id.*
5. The objection, that the names of the witnesses examined before the grand jury are not indorsed upon the indictment, can only be made available to the defendant by a motion to set the indictment aside. *Id.*
6. An application by a defendant to postpone a trial, on the ground of surprise, at the introduction of a witness whose name is not indorsed upon the indictment, must, when made, be supported by an affidavit or other evidence or suggestion showing the surprise, in the absence of which it should be denied. *Id.*

See JUDGMENT, 6, 7; HABEAS CORPUS, 1-3.

DEED.

1. Deeds are always to be construed most strongly against the grantor when there is any uncertainty or ambiguity in their terms. *Dodge v. Walley*, 224.
2. It is the duty of a Sheriff, under an execution, to levy upon and sell the property and all the right, title, and interest of the debtor therein; and where a deed made by him in pursuance of such sale expressly conveys all of the

debtor's right, title, and interest, the purchaser's title to the same will not be prejudiced by the fact that in attempting to describe the nature of the interest the officer through ignorance or mistake failed to set it forth fully and correctly. *Id.*

3. In an action by a purchaser at execution sale to recover the premises from one who previous to the sale had conveyed them to the execution debtor by a warranty deed, the defendant is estopped from asserting any title and cannot avail himself, by way of defense, of any defect in the description of the property in the Sheriff's deed to the plaintiff. *Id.*
4. A person who conveys property by warranty deed, and remains in possession, is not entitled to notice to quit or demand of possession from his grantee or those claiming under him before the commencement of an action to eject him. *Id.*
5. A Sheriff's deed to the purchaser at an execution sale described the property as follows: "All the right, title, and interest of said Daniel S. Clark, against whom the said writs of execution were issued as aforesaid, of, in, and to the following described property, to wit: That certain tract and parcel of land and premises known as the 'Bull Head Rancho,' lying and being situate in Contra Costa County, of said State, and being a leasehold unexpired," etc., proceeding to describe particularly a certain leasehold interest; at the time of the sale the execution debtor was, in fact, the owner in fee of the premises: *held*, that the fee passed to the purchaser—the recital concerning the leasehold interest not operating as a limitation of the preceding general terms of description. *Id.*
6. A deed executed by only a part of the persons named in the body as grantors is good as to the executing parties, and conveys their interest in the property. *Colton v. Seavey*, 496.
7. An acknowledgment of a conveyance taken and certified to by a Justice of the Peace within his county is valid, without regard to the locality of the land conveyed, and though it is situated in another county. *Id.*
8. In the description of a deed one line was described to run "thence westerly, including the cañadas, to a stake, so that a line running from thence to the Dos Pedros will pass about two hundred yards from the present new corral of the said José Jesus Lopez:" *held*, that the line was to be located by the natural landmarks mentioned, although these determined its course to be north-easterly, instead of westerly. *Id.*
9. A description of a line in a deed by natural or artificial landmarks clearly identified, will govern and control one by course or distance where they do not agree. *Id.*
10. Parol evidence is admissible to explain the location of the objects mentioned in the description of a deed, and thus fix the boundary lines of the tract conveyed. *Id.*
11. A subsequent purchaser who seeks to avoid a prior deed of the same premises made by his grantor on the ground that he is a purchaser in good faith and without notice, must show affirmatively that he paid a good and valuable consideration. *Id.*

12. An acknowledgment of the payment of the purchase money by the grantor in a subsequent deed is no evidence of the fact of payment as against one claiming under a prior deed. *Id.*
13. A certificate to the acknowledgment of a conveyance by a married woman which states that she was made acquainted with the contents of the instrument, without stating that this was done by the certifying officer or any particular person, complies with the law and is valid. *Jansen v. McCahill and Wife*, 563.
14. The Notary who certifies to an acknowledgment is a competent witness to establish the due execution of the conveyance, against the denial of the person by whom his certificate states it to have been acknowledged. *Id.*
15. A statement by an alleged grantor to the Notary who certified to the acknowledgment, that the signature is his, is good evidence of the execution, and may be proved by the officer. *Id.*
16. Where the signature of the grantor is, at his request and in his immediate presence, affixed by a third person, it is as much the deed of the former as if signed by himself. *Id.*
See *SOLE TRADER*, 1 ; *ASSISTANCE, WRIT OF*, 1 ; *WITNESS*, 22, 25.
17. To establish title under a deed executed in pursuance of a power authorizing a sale upon notice, as a general rule the giving of the required notice must be proved, and will not be presumed from the execution of the deed. *Simson v. Eckstein*, 580.
18. From lapse of time and acquiescence in the possession of the purchaser the regularity of a sale under a power may be inferred, and a presumption indulged that due notice thereof as required by the power was given. *Id.*
19. A recital of a material fact in a deed is binding and conclusive upon the party reciting it, and all claiming under him as privies. This rule applies to a recital of the facts that a notice of sale, essential to the validity of the deed, was duly given. *Id.*
20. A recital in a deed executed by a mortgagee in pursuance of a power of sale conferred upon him in the mortgage, binds the mortgagor equally as if the deed were executed by him in person. *Id.*
21. Where a deed executed in pursuance of a power is on record and the purchaser in possession, a subsequent grantee of the donor takes with notice, and is bound by a recital of fact in the deed of the donee. *Id.*
22. In ejectment the defendant may recover by showing an outstanding superior title in a stranger, without connecting himself with it. *Id.*
23. Where the purchase money for land is paid by a person other than the grantee in the conveyance, the former is the real purchaser, and the grantee holds the legal title in trust for him. *Id.*
24. Acceptance by the mortgagor of the proceeds of a sale made under a power contained in the mortgage, is a waiver by him of all objections to the sale, and a ratification of the acts of the mortgagee—the donee of the power—in relation to the sale and conveyance, which estops him from contesting their validity. *Id.*

25. Actual adverse and undisturbed possession of land for a period exceeding the time prescribed by statute for the enforcement of a right of entry, gives to the possessor a right of undisturbed enjoyment equivalent to a perfect title. *Id.*
26. In 1853 the defendant took possession of the city lot in controversy under a deed purporting to convey to him the title in fee, in pursuance of a power of sale contained in a mortgage made in 1850, and in good faith, believing himself to be the owner, and claiming so to be against all the world, has since retained actual, manifest possession of the premises. In 1858 the mortgagor executed a deed of the lot to the plaintiff, upon which he relies for a recovery in the present action of ejectment: *held*, that upon his possession alone, without reference to the validity of his title under the deed, the defendant must recover. *Id.*

DEMURRER.

See PLEADINGS, 18.

DEPOSITIONS.

1. A party who appears at the taking of a deposition and examines the witness without objecting to his competency cannot afterwards interpose that objection. *Brooks v. Crosby*, 42.
2. Where the parties stipulated that a deposition which had been taken in another action should be used on the trial "with the same force and effect, and subject to the same exceptions, as if taken in this case:" *held*, that the stipulation was a waiver of any objection to the competency of the witness. *Id.*
3. Where the interest of a witness is disclosed during the examination in chief, an objection to his competency must be taken before the cross-examination. The opposing party cannot take the chances of a cross-examination and then move to strike out. *Id.*
4. What latitude shall be allowed to a plaintiff in introducing evidence in rebuttal after defendant has rested, is entirely discretionary with the trial Court, and its action in this respect is not subject to review upon appeal. *Id.*
5. Where the charge of the Court, taken as a whole, fairly submitted the case to the jury, the judgment will not be disturbed because some instructions were refused which could properly have been given, or that some of those given are subject to verbal criticism. *Id.*

DIVORCE.

1. Cruelty as the ground of a divorce, is such conduct in one of the married parties as renders further cohabitation dangerous to the physical safety of the other, or creates in the other such reasonable apprehensions of bodily harm as naturally interferes with the discharge of marital duty. *Powelson v. Powelson*, 358.
2. Any conduct sufficiently aggravated to produce ill-health, or bodily pain, though operating primarily upon the mind only, is legal cruelty. *Id.*
3. Where it appeared that the defendant was in the habit of using towards the plaintiff, his wife, vile and abusive language, falsely charging her with adul-

terous intercourse—that she was a weak, nervous woman, modest in her deportment, and amiable in her disposition—and that the conduct of the defendant caused her much mental suffering, producing fits of illness, and threatening permanent injury to her health : *held*, that plaintiff was entitled to a divorce on the ground of extreme cruelty. *Id.*

4. In an action for a divorce, where the complaint states the existence of common property, the Court, in addition to granting the divorce, may order a division of the common property and that a homestead be set apart to the plaintiff, although no relief of this character is prayed for in the complaint. *Id.*
5. Where the defendant appears and answers, the Court may, under Sec. 137 of the Practice Act, grant any relief consistent with the case made and embraced within the issues, although not specifically prayed for. *Id.*
6. An objection that a complaint in an action for divorce, stating the existence of common property, is uncertain and defective in not stating the facts showing the property to be common, must be raised by demurrer or it will be deemed waived. *Id.*

EJECTMENT.

1. Where, pending an action of ejectment against a tenant, the latter transferred the possession to his landlord who had actual notice of and defended the suit, but was not made a party, and plaintiff recovered judgment : *held*, that under the writ of restitution authorized by the judgment, the landlord might be dispossessed. *Sampson v. Ohleyer*, 200.
2. In ejectment against the occupant of the premises, a judgment of recovery binds not only the defendant but all persons who receive possession of the premises from him with actual notice of the pending suit. *Id.*
3. Persons not parties to a suit in ejectment and in possession before and at the time it is brought, or those claiming under them, cannot be ousted by the writ of restitution issued upon a judgment therein in favor of the plaintiff. *Id.*
4. A person in possession of land where a writ of restitution is served, is presumed to hold under the defendant in the action, and to avoid being dispossessed by the writ, must show affirmatively that he holds by a right independent and paramount. *Id.*
5. If a judgment is recovered against a party by the fault of an attorney employed by him therein, the party has his remedy against the attorney, but the judgment cannot be disturbed on that account, unless fraud, or collusion, or insolvency of the attorney is shown. *Id.*
6. In the absence of any statutory regulation a purchase made of property actually in litigation, *pendente lite*, for a valuable consideration, and without any express or implied notice, in point of fact affects the purchaser in the same manner as if he had such notice, and he will accordingly be bound by the judgment. *Id.*
7. The effect of our statute (Practice Act, Sec. 27), providing for the filing of a *lis pendens*, is to abrogate the rule making the mere pendency of an action con-

- structive* notice. It does not change the rules of law relating to *actual* notice of a pending action, and the effect of such actual notice upon parties dealing with or taking possession of property in litigation. *Id.*
8. Where after the commencement of an action of ejectment against a tenant he gave notice thereof to his landlord, and requested him to defend, and the latter employed an attorney to conduct the suit: *held*, that the actual notice given to the landlord was, as to him, equivalent to the filing of a *lis pendens*, and in an equal degree made the subsequent judgment obligatory upon him. *Id.*
 9. In an action of ejectment against several defendants the plaintiff may at any time before trial dismiss the action as to some of the defendants and proceed against the others alone. *Reed v. Calderwood*, 463.
 10. C. being one of four defendants in ejectment, moved to transfer the action to a United States Court on the ground of his alienage, and an order was made staying all proceedings until the motion could be heard. Before the hearing of the motion plaintiffs dismissed the action as to C. and one other defendant, and took judgment against the other two, who had made default. C. afterwards insisted upon his motion, and filed affidavits tending to show that the defaulting defendants were occupying the premises as his tenants, and were colluding with the plaintiff. The motion was denied, and C. having appealed from that order and from the judgment: *held*, that the denial of the motion was proper, as after C.'s dismissal it could not properly be entertained. *Id.*
 11. *Held*, further, that C. was not in a position to contest by an appeal the validity of the judgment against the defaulting defendants—that if in entering the default and judgment there was collusion by which he was prejudiced, he should have moved in the Court below to set them aside and for leave to appear as landlord and defend. *Id.*
 12. In ejectment it is not necessary to a recovery by defendant that he show any title in himself. He may (except in the case of public lands where the rule is qualified) defeat the action by showing title and right of possession in a third person. *Moore v. Tice*, 513.
 13. Under our Practice Act, if it appear that the plaintiff in ejectment had a right to recover at the commencement of the suit, but that his right has terminated during its pendency, he cannot recover the possession but only his damages. *Id.*
 14. A deed executed to the defendant in ejectment after the commencement of the action is admissible evidence for him. *Id.*
 15. Where the statement on appeal does not purport to contain all the evidence, the Appellate Court will not consider an objection that the verdict is not sustained by the evidence. *Id.*
 16. A merely equitable title to land, if of such a character as in equity entitles the holder to possession, is a sufficient defense, under our system of practice, to an action for the possession brought by the holder of the legal title. *Willis v. Wozencraft*, 607.
 17. Whenever a right claimed under the rules of the common law is denied, governed, or controlled by the principles administered by Courts of Equity, the latter will prevail over the former. *Id.*

18. The plaintiff, to recover in ejectment, must show both a legal and equitable title, or right of possession. From proof of the legal title a right of possession will be presumed, but the presumption may be rebutted by proof of an equitable title in another of a character to carry the right of possession. *Id.*
19. Where one contracting for the purchase of land received the possession with a bond for a deed upon payment of the purchase money, and containing a stipulation that the purchaser was in possession and entitled to the rents and profits: *held*, in an action of ejectment against the vendee remaining in possession by a subsequent purchaser from the vendor with notice, that the defendant should prevail without reference to the payment or non-payment of the purchase money. *Id.*
20. The doctrine of *Gaven v. Hagen* (15 Cal. 208), that a vendee of real estate under a contract of purchase, which is silent as to the possession, has no right to the possession until a performance of the conditions prescribed by the contract to entitle him to a deed, commented upon and questioned. *Id.*

EQUITY.

See EJECTMENT, 16, 17.

ERROR.

See WITNESS, 6, 7 ; MORTGAGE, 9.

ESTATES OF DECEASED PERSONS.

1. A remedial statute, when the meaning is doubtful, must be construed liberally, and so as to extend the remedy. *Cullerton v. Mead*, 95.
2. In construing a particular section of a statute, it should be considered together with the other sections, and its language so interpreted as to give to it utility and effect, and to make it compatible with common sense and the dictates of justice. *Id.*
3. A creditor of the estate of a deceased person, who is absent from the State during the whole period of publication of the notice to creditors, and has no actual knowledge of the publication, may present his claim to the administrator at any time before the decree of distribution is entered. No other proof of absence will be required than his own affidavit. Nor will the time for filing his claim be limited by the fact of his return to the State before the expiration of the ten months, within which, by the terms of the notice, claims were required to be presented. *Id.*
4. The provision of Sec. 130 of the Act to Regulate the Estates of Deceased Persons, that it must appear to the "satisfaction of the administrator and the Probate Judge" that the claimant had no notice, gives to those officers no power or right to arbitrarily say they are not satisfied, and to therefore reject a claim. An affidavit of the claimant, showing to the satisfaction of a reasonable, fair, and impartial mind that he had no notice, is all that is required. *Id.*
5. By Sec. 141 of the Act to Regulate the Estates of Deceased Persons, judgments are exempted from the provision of Sec. 131, requiring an affidavit

to be attached to the claims showing that it is due, and that there have been no payments, and are no offsets. *Id.*

6. Money received by an administrator in payment for goods sold by his intestate as factor upon a *del credere* commission, forms no part of the assets of the estate, and may be recovered by the consignor in an action for money had and received. *Stanwood v. Sage*, 516.
7. Under our system of practice any pleading is sufficient in form which properly states the facts essential to a recovery. *Id.*
8. A complaint in the old form for money had and received, is proper when a recovery is sought of money which defendant has received and refused to pay on demand to the plaintiff who is entitled to it. *Id.*

See COUNTER CLAIM.

ESTOPPEL.

See WITNESS, 12.

EVIDENCE.

1. The competency of a witness whose interest has been created by his execution, as surety, of a statutory undertaking made on behalf of one of the parties for the purposes of the action, may be restored on the trial, either by the substitution of another surety upon the undertaking, or by a deposit in Court of a sufficient sum of money to cover all liability attaching to the proposed witness by reason of his suretyship. *Klockenbaum v. Pierson*, 160.
2. Alleged errors in findings of fact, will not be considered where the findings themselves are immaterial to the decision. *Id.*
3. An affidavit of a party that he was surprised at the admission of a witness on the trial because his attorney had advised him that the witness was incompetent, and that he was also surprised by the testimony of the witness in stating a certain conversation incorrectly, is not sufficient to authorize the granting of a new trial on the ground of surprise. *Id.*
4. Where, during the progress of a trial, the existence or the materiality of absent evidence is first discovered, the party desiring such evidence should move for a continuance until it can be obtained, and failing to do this, he cannot have a new trial on the ground that the evidence was newly discovered. *Id.*
5. A new trial will not be granted because of the discovery of new evidence which is merely cumulative, and which, if produced, would only tend to contradict a witness of the opposing party. *Id.*
6. Where the plaintiff in ejectment seeks to establish a prior possession under a land warrant location, the patent issued to him in pursuance of the location after the commencement of the action is admissible as evidence in his favor to show the date and location of the warrant, and that his right of possession thereunder has since ripened into a perfect title. *Gallup v. Armstrong*, 480.
7. A patent issued by the Government is admissible in evidence, without any proof of its execution. The official seal sufficiently authenticates it. *Id.*

See WILL, 3; CORPORATION, 1; WITNESS, 10-12; PROMISSORY NOTE; DEED,

10, 12, 14, 15; EJECTMENT, 14; WITNESS, 24, 25; SCHOOL LANDS, 3; APPEAL, 9.

EXECUTION.

1. An execution debtor who has more horses than the number exempt by law, may elect which he claims as exempt, but such election must be made and the officer notified thereof either at the time of the levy or within a reasonable time thereafter or the right to elect will be deemed waived. *Borland v. O'Neal*, 504.
2. Where two of several horses owned by an execution debtor were levied upon and no notice of claim of exemption was given to the officer until the day of sale, which was four months after the levy: *held*, that the right of election had been lost by the unreasonable delay in exercising it, and that the officer was justified in selling the property. *Id.*
3. In determining whether notice of claim of exemption of property levied upon was given by the debtor within a reasonable time, the fact that the plaintiff had at the time of the levy other property of a similar character out of which the debt might have been made is proper matter of proof. *Id.*
4. The exemption of property from sale on execution is a personal right which the debtor may waive or claim at his election. *Id.*
5. An action cannot be maintained by the defendant in an execution to recover of the officer the penalty prescribed by Sec. 222 of the Practice Act for selling without proper notice, unless by a sale so made the complainant has been deprived of his property. If the attempted sale is a nullity and passes no title, no injury has been sustained, and no right of action for the forfeiture accrues. *Askew v. Ebberts*, 263.
6. No right of property vests in the purchaser at an execution sale until he pays the purchase money, and until this is done, the sale is not so far perfected as to constitute the foundation of an action to enforce a forfeiture for selling without the prescribed notice. *Id.*
7. In an action to enforce a penalty or forfeiture imposed by statute the claim is to be strictly construed. *Id.*

See MORTGAGE, 18; LIMITATIONS, 7.

EXEMPTION.

See EXECUTION.

FEEs.

1. By an act passed in 1855, Constables in El Dorado County were allowed the same fees as Sheriffs for like services in criminal cases. In 1859 an act was passed allowing the Sheriff of that county fifty cents per mile for travel in making an arrest. In 1860, by a special act making no reference to Constables, the Sheriff in that county was made a salaried officer, and allowed no fees—Sec. 15 provides that all former acts "conflicting with the provisions of this act are hereby repealed so far as they relate to the said several officers herein named." In 1862 an act amendatory of the act of 1860 was passed, the second section of which provided, as an amendment to Sec. 8 of the original act, that

two deputies should be allowed the Sheriff, and that "the said deputies or other officers performing such services should receive twenty cents per mile in criminal cases for each mile actually traveled in going only; and Sec. 5 of which declared that "so much of any acts or parts of acts (as are) inconsistent with the provisions of this act are hereby repealed:" *held*, that the last act applied to Constables, and repealed all the provisions of former acts in reference to their mileage in criminal cases, and that they are entitled therefore to only twenty cents per mile for travel in such cases. *Simonton v. El Dorado County*, 554.

FORCIBLE ENTRY AND DETAINER.

See NEW TRIAL, 2.

FRANCHISE.

1. Exclusive franchises and privileges may be conferred by the Legislature upon persons or corporations, and no restriction upon this power is imposed by the State Constitution except as to the particular privileges specified therein. *California State Telegraph Co. v. Alta Telegraph Co.*, 398.
2. The Act of May 3d, 1852, granting to Allen & Burnham the exclusive right to a line of telegraph between Sacramento and San Francisco, is constitutional. *Id.*
3. Corporations formed under the general law have the power to purchase and hold an exclusive franchise or privilege granted by the Legislature to an individual and his assigns. *Id.*
4. A corporation may receive from the Legislature a direct grant of special privileges and franchises. *Id.*
5. The provision in the Act of May 3d, 1852 (granting to Allen & Burnham the exclusive right to a telegraph line between San Francisco and Sacramento), that "no existing law shall be so construed as to conflict or interfere with the provisions of this act," did not operate as a repeal of the general corporation law so far as to take away the right of forming corporations to build lines between those cities, but only to subject subsequent builders to the prior exclusive privileges of the grantees. *Id.*
6. The power of a corporation, by the law under which it is created, to purchase a particular character of property cannot be questioned in an action between it and another corporation or person. It is a question between the corporation and the State, to be determined in a proceeding by the latter for a forfeiture. —COPE, C. J. *Id.*

See CORPORATION, 14.

FRAUDS, STATUTE OF.

1. In order that a verbal contract for the purchase of goods or chattels at a price exceeding two hundred dollars may be saved from the operation of the Statute of Frauds by a delivery, there must be a transfer of possession evidenced by acts, and not by words merely. *Malone v. Plato*, 103.
2. Where, after an alleged verbal agreement for the sale of a pair of horses, they remained in the seller's livery stable, where they had been previously kept: *held*, that proof of a direction by the purchaser to the seller to keep the

horses in the stable for him, or of any other language of that import, was insufficient to show such a delivery as is required by the thirteenth section of the Statute of Frauds. *Id.*

3. Defendant upon the purchase of certain land from B, agreed with him in writing, as part of the consideration, to pay to plaintiff a debt then due the latter from B. Plaintiff afterwards assented to the arrangement, and verbally agreed with defendant to look to him for his debt and release B: *held*, that this agreement was not within the Statute of Frauds, and gave plaintiff a right of action against defendant for the debt. *McLaren v. Hutchinson*, 187.
4. Whether the assent of plaintiff was necessary in order to enable him to maintain the action, see in connection with former decisions in this case 18 Cal. 80; *Lewis v. Covillaud* (21 Id. 178).
5. When A by agreement between him and B, assented to by C, becomes liable to pay to the latter a debt originally due to him from B, the assignee of C may maintain an action for the debt, in his own name, against A. *Id.*
6. Where the proof was that defendant, having agreed with B, whom he owed, to pay in lieu thereof to the plaintiff, a creditor of B, the amount of his (plaintiff's) demand, afterwards met the plaintiff and stated to him that he (defendant) had agreed with B to pay his (plaintiff's) claim, and was to pay it, and that plaintiff then stated his "willingness to look to defendant": *held*, that this proof authorized a finding that defendant agreed with plaintiff to pay him his demand. *Id.*
7. An instruction which embraces a statement that a witness has testified to certain facts should be refused. *Weil v. Paul*, 492.
8. S., a clothing merchant whose goods were under attachment, sold them to W., who procured the release of the attachment, and removed the stock to his, W.'s, cigar store. Within less than two weeks thereafter, S. was engaged professedly as employé of W. in peddling out the goods and managing their sale at retail, in which condition they were again attached as the property of S.: *held*, that there was no such actual and continued change of possession as was required by the fifteenth section of the Statute of Frauds, and that the goods were therefore liable to the attachment. *Id.*
9. Where the vendor of goods is not at the time in possession, the transfer is an "assignment" within the meaning of that term in the fifteenth section of the Statute of Frauds, and an actual and continued change of possession is required equally as in case of a sale by one in possession. *Id.*

See PARTNERSHIP, 1; DEED, 11; TRUST, 3.

GARNISHMENT.

1. The fact that the defendant in an action for the recovery of money has been garnished by a creditor of the plaintiff, constitutes no defense to the action, and cannot be set up in the answer as a plea in bar. The remedy of defendant in such case is by motion, based upon affidavit of the fact, for stay of proceedings until the action against the plaintiff or the attachment therein is disposed of. *McKeon v. McDermott*, 667.
2. A judgment rendered in an action tried by the Court without a jury prior to

the twentieth of May, 1861 (the date of the act requiring exceptions to defective findings or want of a finding), will be reversed for a failure by the Court to file its findings of fact. *Id.*

HABEAS CORPUS.

1. Where, upon application for discharge by *habeas corpus*, it appears that the prisoner, by virtue of a commitment in due form, is detained to answer an indictment pending in a Criminal Court, the Court or Judge hearing the application may proceed to inquire whether the indictment charges any offense known to the law; and upon determining that it does not, may discharge the prisoner. *In Matter of John R. Corryell*, 178.
2. The statement in an indictment of some offense known to the law is essential to the jurisdiction of the Court, and is, therefore, under well settled rules, a fact which may be inquired into upon *habeas corpus*. *Id.*
3. The engrossed copy of a legislative bill of any session prior to that of 1862 is not a public record within the meaning of Sec. 87 of the act concerning crimes and punishments. *Id.*

HOMESTEAD.

1. Where some of several defendants make default and others answer, the defaulting defendants may appeal from the final decree at any time within one year after its rendition. *Gimny v. Doane*, 635.
2. The statute which prescribes what shall be common property as between husband and wife, and how it shall be divided in case of a divorce, is a mere regulation of a right of property and does not provide a new right of action. A complaint for relief under this statute need not therefore comply with the rules governing the forms of pleadings in statutory actions. *Id.*
3. The failure of a complaint, in an action for a division of common property, to state with sufficient particularity the facts showing the character of the property is a defect of form which must be objected to by demurrer. *Id.*
4. A homestead may be established upon the common property of the husband and wife, and such homestead may, in case of a divorce, be partitioned or set apart to one of the parties as common property. *Id.*

HUSBAND AND WIFE.

See HOMESTEAD, 2.

INDORSER AND INDORSEE.

1. A complaint which states the facts of the case in ordinary and concise language is not demurrable, because such statement shows that the plaintiff is entitled to recover upon two different legal grounds. *Mills v. Barney*, 240.
2. Where a certificate of deposit is indorsed by the payee, payable to the order of a third person, the indorsement of the latter may be required by the makers before payment. *Id.*
3. Certificates of deposit stand, as respects the rights and liabilities of indorsers, upon the same footing as bills of exchange and promissory notes. *Id.*

4. A subsequent indorser of a certificate of deposit undertakes that he possesses a clear title to the certificate, deduced from and through all the antecedent indorsers, and by his indorsement agrees to clothe the holder under him with all the rights which legally attach to genuine indorsements against himself and all the antecedent indorsers. *Id.*
5. A judgment will not be reversed on account of the admissions of improper evidence which is mere surplusage and immaterial to the issues. *Id.*
6. When the makers of a certificate of deposit pay the amount to an indorsee who guarantees the genuineness of the payee's indorsement, and subsequently the payee, upon proof that his indorsement was forged, recovers from the makers the amount of the certificate with costs, the makers in an action by them against the subsequent indorsee and guarantor may recover the costs paid by them in the former action. *Id.*
7. A verified complaint, which in stating a special demand essential to the cause of action, contains only the general averment that "defendants though often requested have refused," etc., is sufficient in this respect unless demurred to for want of certainty. If not demurred to, the defective averment is cured by verdict and judgment, and the objections cannot be raised for the first time in the Appellate Court. *Id.*

See PLEADINGS, 12, 16.

INJUNCTION.

1. Affidavits filed by a defendant, in opposition to an application for an injunction, made upon the complaint alone, are part of the record, and, upon appeal from the order, may be considered, although not embraced in the statement. *Gagliardo v. Crippen*, 362.
2. When the equities of a complaint are fully denied by affidavits on the part of defendant, an application for an injunction, *pendente lite*, should be denied. *Id.*
3. Notice of an application by plaintiff for an injunction must be given for the length of time presented by Sec. 517 of the Practice Act. If given for a shorter time and defendant does not appear, he may treat an injunction thus obtained as granted without notice, and move to dissolve the same under Sec. 118. *Johnson v. Wide West Mining Company*, 479.
4. Where a motion to dissolve an injunction is heard upon the pleadings alone, it should not be granted if the answer denies all the material allegations of the complaint. *Id.*

See MINING CLAIMS, 1, 5; STREETS, 2.

INSOLVENCY.

1. The fact that the schedules of losses and property attached to the petition of an insolvent are defective in not setting forth the items with sufficient particularity, is no ground for dismissing the proceeding for his discharge. These defects affect the sufficiency of the papers as pleadings, but not the question of jurisdiction. *Bennett v. His Creditors*, 38.
2. In a proceeding for discharge by an insolvent, the filing of the petition, which stands in the place of a complaint, and due publication of the notice to cred-

itors, which stands in the place of a summons, give the Court jurisdiction over the subject matter and the parties. *Id.*

3. If the schedules attached to the petition of an insolvent do not set forth the items with sufficient particularity, the proper remedy is by motion to require the insolvent to state them properly, and not by motion to dismiss. *Id.*
4. An objection by the respondent that the transcript does not contain the whole record must, under the rules of this Court, be made before the case is submitted. If made for the first time in a brief after submission it will not be considered. *Id.*

INSTRUCTIONS.

See WITNESS, 2, 6; DEPOSITIONS, 5.

JUDGMENT.

1. *People ex rel. Burr v. Dana*, ante page 11, affirmed as to the extent of "the Government Reservation" in San Francisco, and its exemption from the operation of the Water Lot Act of 1851. *Blanc v. Bowman*, 23.
2. The fact that one of the Judges who participated in a decision of this Court concurred in by only two Judges, did not hear the oral argument, does not render the judgment absolutely void. It is an irregularity which may be waived by the parties. *Id.*
3. Thus, where previous to the argument of a case the counsel on both sides agreed that one of the Judges might participate in the decision, although he should not be present at the oral argument, and that Judge, not having heard the argument, subsequently, in connection with one of the other Judges, rendered a decision: *held*, that the judgment was valid, the requirement of the statute as to the presence at the argument of the Judges making the decision, having been waived by the agreement. *Id.*
4. This Court loses all control and jurisdiction over a case after the *remittitur* has been filed in the Court below. *Id.*
5. A motion, therefore, to vacate a judgment on the ground that it was not rendered by the proper members of the Court, cannot be entertained after the *remittitur* has been filed below.
6. A judgment in a criminal action that the defendant be imprisoned for a specified term, "to commence at the expiration of previous sentences," is valid and warrants the detention of the defendant for the aggregated period of all the sentences. *People v. Forbes*, 135.
7. Judgments of inferior criminal Courts created by statute are not required to be of any different form from those of criminal Courts of general jurisdiction. *Id.*

See WILL, 10; SET-OFF, 1-3, 5; CORPORATION, 25, 26.

JURISDICTION.

See ALIENS, 2, 3; JUSTICES OF THE PEACE, 1, 2, 6, 7.

JUSTICES OF THE PEACE.

1. The "amount in controversy," which, in actions on contract, determines the

jurisdiction of a Justice's Court, is the principal sum sued for exclusive of costs. *Bradley v. Kent*, 169.

2. A Justice's Court, or a County Court on appeal from a Justice's Court, does not necessarily exceed its jurisdiction by rendering a judgment for more than two hundred dollars. The judgment may exceed the "amount in controversy" upon which alone the jurisdiction depends. *Id.*
3. The provisions of Sec. 422 of the Practice Act, authorizing parties to be examined as witnesses on their own behalf, are applicable to Justices' Courts. *Id.*
4. A notice for a party to testify, under Sec. 22 of the Practice Act, while it need not set forth all the evidence, or each particular fact, upon which the party intends to be examined, must specify each particular subject matter respecting which he intends to testify with a reasonable degree of certainty and particularity. It is insufficient to merely refer to the issues or the allegations of the pleadings. *Id.*
5. A notice for a party to testify, stated the points as follows: "And the points upon which it is intended to examine said Charles Kent, defendant, on said trial will be on every issue made by complaint and answer now on file in said cause, and every allegation contained in plaintiffs' said complaint denied by defendant's answer, and particularly concerning the matters alleged by plaintiffs on transfer of note to Charles Kent by Vandiven; also all the allegations made by plaintiffs concerning protest, demand, presentment, and notice, and averred waiver of demand, denied by defendant: *held*, that the notice was too uncertain and indefinite to authorize any examination of defendant on his own behalf. *Id.*
6. In an action in a Justice's Court to recover personal property valued at less than two hundred dollars, the fact that plaintiff in his complaint prays a recovery, in addition to the property or its value, of damages in the sum of two hundred dollars, does not deprive the Court of jurisdiction. The prayer for damages may be stricken out or disregarded. *Wratton v. Wilson*, 465.
7. To justify the issuing of a writ of *certiorari* from the District Court, to review proceedings in an action which has passed to judgment in a County Court, on the ground that the latter Court had no jurisdiction by reason of the excess of the amount in controversy, the affidavit by the applicant must state the amount of the judgment rendered. The question of jurisdiction depends upon the amount of the judgment, and not upon the amount prayed for in the complaint. *Id.*

See MANDAMUS, 2, 3; CONSTITUTIONAL LAW.

LANDLORD AND TENANT.

See EJECTMENT, 1, 8.

LANDS.

See TAXES, 1, 2; CORPORATIONS, 15, 16.

LIENS.

1. Under our code of practice the same rules of pleading govern in all cases, both at law and in equity. *Bowen v. Aubrey*, 566.

2. A complaint, whatever may be the character of relief sought, must state only issuable facts and not mere matters of evidence. Where this rule has been violated, a motion by defendant to strike out the irrelevant matter should be sustained. *Id.*
3. Knowledge, by a sub-contractor upon a building, that there is an agreement in writing between the original contractor and the owner, is sufficient to put him upon inquiry as to the contents of the writing and charge him with notice thereof. *Id.*
4. When the owner makes a contract for erecting or doing work upon a building, no sub-contractor or person furnishing labor or materials for the original contract can acquire any rights against the owner, in contravention of the terms and conditions of the original contract. *Id.*
5. Where an original contractor sub-contracts work upon a building, there is no privity between the sub-contractors and the owner, and the latter cannot be made liable upon the sub-contract. *Id.*
6. A party may, by agreement, waive a right created by statute for his benefit. *Id.*
7. P. and others, contracted in writing with A., that the latter should erect a building for them, and in the agreement covenanted that he would not incur or suffer to be incumbered the said building, or lot on which it is erected, by any mechanics' liens or debts of material, labor-men, contractors, sub-contractors, or otherwise." A. sublet the brick work to C., who had notice of the existence of the written agreement. *Id.*
8. *Held*, that C. was precluded by the condition in the original contract from acquiring a mechanics' lien upon the building for the work done by him. *Id.*

LIMITATIONS, STATUTE OF.

1. After an action has been tried and submitted the plaintiff has no right to dismiss it, nor has the Court then any authority to enter an order of dismissal without the consent of the defendant. *Heinlin v. Castro*, 100.
2. In an action tried by the Court without a jury, the parties, at the September Term, introduced their proofs and submitted the case, which was taken under advisement by the Court. On the first day of the succeeding term, and before the decision was rendered, the plaintiff moved, *ex parte*, for a dismissal without prejudice, which was granted; subsequently, at the same term, on motion of defendants, the order of dismissal was vacated and a finding filed in favor of defendants upon which judgment was entered: *held*, that the order dismissing the action was unauthorized, and that the subsequent order vacating the dismissal was therefore proper. *Id.*
3. Where an action upon a promissory note is barred by the Statute of Limitations, the remedy upon a mortgage given to secure it is also barred. *Id.*
4. *McCarthy v. White* (21 Cal. 495) affirmed on this point. *Id.*
5. A part payment, indorsed upon a promissory note, whether made before or after the expiration of the period fixed by the Statute of Limitations, does not avoid the bar of the statute. *Id.*

6. To take a contract out of the statute there must be an acknowledgment or new promise "contained in some writing signed by the party to be charged thereby." *Id.*
7. The statute limiting the time for issuing execution upon a judgment to five years after its entry, applies to judgments rendered in suits to foreclose a mortgage, equally as to mere personal judgments. *Stout v. Macy*, 647.
8. Where in an action to foreclose a mortgage a decree was entered in the usual form for the sale of the mortgaged premises and execution against the debtor for any deficiency, and no process to enforce the decree was issued until more than five years after its entry, when the plaintiff in the judgment took out an execution: *held*, that an action might be maintained by the defendant in the judgment to enjoin all proceedings upon the execution. *Id.*

See PLEADINGS, 11; DEED, 25, 26.

LIS PENDENS.

See EJECTMENT, 6, 7.

MAINTENANCE.

See CONTRACT, 4.

MALICIOUS PROSECUTION.

See ASSIGNOR AND ASSIGNEE, 1-3.

MANDAMUS.

1. *Mandamus* does not lie to compel an inferior tribunal to act in a particular manner in a matter respecting which it is invested with discretionary power. *The People ex rel. Flagley v. Hubbard*, 34.
2. The action of a Justice's Court in granting or refusing a change of venue cannot be reviewed in an application for a *mandamus*. By this writ the Justice may, in case of his refusal, be compelled to act, but his erroneous action cannot be thus corrected. The remedy is by appeal. *Id.*
3. A Justice's Court to which a case has been transferred from another similar Court may again, for cause shown, change the venue. *Id.*

See RESTITUTION, WRIT OF.

MARRIED WOMAN.

See SOLE TRADER, 13.

MINERAL LANDS.

1. The right to the use of growing wood and timber upon the public mineral lands, as between the claims of miners on the one hand and agriculturists on the other, is governed by the rule of priority of appropriation. *Rogers v. Soggs*, 444.
2. The possession of public land in the mineral districts of this State, acquired and held in accordance with the possessory act for agricultural purposes, carries with it the right to the wood and timber growing thereon, and this right

is superior to that of subsequent locators of mining claims who need, and seek to use, the wood and timber for carrying on their mining operations. *Id.*

3. In an action between occupants of the public lands neither party can claim a right to the growing timber thereon under the laws of the United States. The cutting or destruction of the timber by any occupant is expressly prohibited by Act of Congress of March 2d, 1831. *Id.*

MINING CLAIMS.

1. In an action for a trespass upon a mining claim, where the complaint avers that defendants are working upon and extracting the mineral from the claim, and prays for a perpetual injunction, and the answer admits the entry and work and takes issue upon the title; if a jury to whom the issue of title is submitted find in favor of the plaintiffs, it is the duty of the Court to decree the equitable relief sought, and enjoin defendants from future trespasses. *McLaughlin v. Kelly*, 211.
2. The complaint charged that defendants had wrongfully entered upon a tract of mining ground (described by metes and bounds) owned by the plaintiffs, and had extracted therefrom gold-bearing earth of the value of \$1,000, and that they threatened to continue their wrongful acts, and prayed for damages in the sum of \$1,000, and for a perpetual injunction. The answer set up title in defendants to a specific portion of the tract claimed by plaintiffs, and denied that they had worked upon any other portion than that to which they thus asserted title. *Id.*
3. The jury under a general submission found "a verdict in favor of plaintiffs with one dollar damages:" *held*, that the verdict decided the question of title in favor of plaintiffs, and that upon it they were entitled to a decree perpetually enjoining defendants from working upon the ground claimed in the complaint; that this equitable relief was a matter of right, the denial of which by the District Court was error. *Id.*
4. The Court in the case above cited having instructed the jury that, if they found that plaintiffs were entitled to the mining ground, they must find a verdict for \$1,000 damages upon the admissions of the answer: *held*, that because the jury brought in a verdict for one instead of one thousand dollars' damages, it was not therefore to be concluded, in direct opposition to their general verdict, that they did not find the title in the plaintiffs. The damages being admitted by the pleadings were not in issue, and the verdict in that respect was immaterial. *Id.*
5. It is no reason for refusing a perpetual injunction in an action of trespass in which the title has been litigated, that defendants will thereby be precluded from asserting their title in any other form of action. When there has been a fair trial of an issue of fact, Courts give the verdict and judgment a conclusive effect, and will not permit the parties to relitigate the same matter in another suit. *Id.*
6. Where in an action of trespass the jury find generally "for the plaintiffs," it is a finding upon all the issues raised by the pleadings material to a recovery by the plaintiffs, and concludes the parties upon a question of title where it was distinctly put in issue. *Id.*

7. Under our code of practice to ascertain what was in fact determined by the findings or verdict, we must look solely to the material facts put in issue by the pleadings, and not to the form of the action.
8. The mere fact that the pleader has used terms of expression in stating his case which were under the old system of practice used in particular kinds of action, will not necessarily give character to, or determine the effect or meaning of, the verdict. *Id.*

See RECEIVER, 1, 3; MORTGAGE, 18.

MORTGAGE.

1. A power of sale contained in a mortgage is a merely cumulative remedy, and does not affect the right to foreclose in chancery. *Cormerais v. Genella*, 116.
2. G., to secure the payment of his three promissory notes, made severally to C., F., and S., executed an instrument whereby he conveyed to C. certain real estate upon the condition that if he, G., should pay the notes according to their tenor, the conveyance should be void; but providing that if default should be made in the payment, then it should be lawful for C., after notice, to enter upon and sell the premises and apply the proceeds to the payment, which sale should be a bar both in law and equity against G. and his representatives: *held*, that this instrument was a mortgage with an ordinary power of sale, and not a trust deed, and that its character as a mortgage was in no respect changed because the mortgagee was a trustee for himself and other parties. *Id.*
3. Where a mortgage contains a power of sale, the mortgagee has his election either to foreclose in chancery and obtain a judicial sale, or to sell under the power. *Id.*
4. Whether a right of redemption exists after a sale under a power contained in a mortgage—*Query?* *Id.*
5. In an action to foreclose a mortgage under our statute, as well since the amendments of 1860 and 1861 as before, a personal judgment for the debt secured may be entered in connection with a decree directing a foreclosure and sale. This judgment cannot, however, be docketed, or become a lien on other property, or authorize the issuance of an execution until after the sale is made and the proceeds applied *pro tanto* to its satisfaction. *Id.*
6. A mortgage of real estate does not, in this State, confer the right to the possession of the mortgaged property, except as the result of a foreclosure and sale. *Kidd v. Teeple*, 255.
7. By an instrument in writing, a ditch company "granted, bargained, and sold" a water ditch "and also the entire proceeds derived from said ditch, from the sale of water, and also the proceeds from the sales of water" from another ditch, called the Virginia Ditch; and in the same connection the grantees were authorized "to collect, demand, and receive the rents, issues, and profits, and the entire proceeds" of said ditches, or sufficient thereof to meet the payments thereafter mentioned. Then followed the usual proviso in a mortgage, that if the several installments of a certain debt, due the grantees, were duly paid, the conveyance should be void—and a further clause, that in

default of payment the grantees might sell the "premises before described with all the appurtenances" in the manner prescribed by law: *held*, that the instrument was, as to all the property mentioned in it, simply a mortgage, and that nothing in the provisions respecting the profits and proceeds of sales of water authorized the mortgagees to take possession of either ditch before a foreclosure and sale. *Id.*

8. After a sale of mortgaged premises on execution against the mortgagor, and a delivery of the Sheriff's deed to the purchaser, the mortgagee can acquire no right of entry by a permission from the mortgagor who has remained in possession. *Id.*
9. A judgment will not be reversed on account of error in admitting improper evidence upon a point immaterial to the decision. *Id.*
10. When a judgment is correct by the record, it will be affirmed without reference to the grounds upon which it was rendered by the Court below. *Id.*
11. The respondent may insist, in the Appellate Court, upon a point properly presented, although it was not urged in a trial Court. *Id.*
12. A mortgagor may, in this State, maintain an action to redeem the mortgage. *Daubenspeck v. Platt*, 330.
13. The plaintiff in an action to redeem a mortgage need not allege or prove a tender of the amount due upon the mortgage debt previous to the commencement of the action. *Id.*
14. Where property is mortgaged by an unrecorded deed, absolute upon its face, accompanied by a separate defeasance, possession and actual occupation by the mortgagor is notice of his title to a purchaser from the mortgagee. *Id.*
15. On the twenty-second day of June, 1857, T. H. O. Walton sold a half interest in a ditch to G. W. Walton, who in part payment agreed, from the proceeds of said interest, to pay \$5,000 upon two promissory notes, executed by the grantor and one Hall to Parsons. February 12th, 1858, G. W. Walton sold and conveyed this interest in the ditch to G. V. Fairbanks for \$10,500, of which \$2,700 was paid at the time but not applied on the notes held by Parsons, and a mortgage given upon the half interest for the balance. Afterwards, G. V. Fairbanks sold to Jonathan Fairbanks, and soon after G. W. Walton gave to Parsons a written acknowledgment, that he had bought the interest in the ditch upon condition to pay \$5,000 of its proceeds upon the Walton and Hall notes, and that all moneys due to him upon his note to Fairbanks, were due and payable to Parsons until the \$5,000 should be paid. After receiving this acknowledgment Parsons transferred the Walton and Hall notes to Jonathan Fairbanks by indorsement, and took from the latter his note for \$5,000, secured by a new mortgage on the ditch: *held*, that any interest which Parsons acquired by the acknowledgment in the Walton mortgage he parted with by the transfer of his notes to Fairbanks; that the last note and mortgage could not be considered a renewal of the \$5,000 debt evidenced by the transferred notes; and, that the Walton mortgage was a lien upon the ditch for the balance of the debt secured thereby, over and above the amount of \$5,000, superior to any lien retained by Parsons thereon for the payment of the balance due him. *Parsons v. Fairbanks*, 343.

16. In the absence of fraud or mistake a party cannot escape the consequences of an arrangement voluntarily made by him, because of a misunderstanding of its legal effect. *Id.*
 17. Where land is mortgaged by an absolute deed with a defeasance back, an absolute conveyance of the premises by the mortgagee to a third person amounts to an assignment of the mortgage; the grantee being substituted to the rights of the mortgagee. *Halsey v. Martin*, 645.
 18. The interest of a mortgagor in a mining claim is liable to attachment and sale under execution, and the purchaser acquires the right of possession as against the mortgagee until foreclosure. *Id.*
 19. The plaintiff in ejectment to recover an undivided interest in land may have a recovery of a less undivided interest than that sued for. *Id.*
- See CORPORATION, 2, 6, 17, 20, 22, 24; STREETS, 1, 2; DEED, 20, 24; LIMITATIONS, 8.

NEW TRIAL.

1. The power to grant new trials is one of legal discretion, and the abuse of that discretion only will justify an interference with such order by the Appellate Court. *Quinn v. Kenyon*, 82.
2. Where, in an action of forcible entry and detainer, plaintiff had judgment in the Justice's Court for twelve dollars damages and twenty dollars fine, besides costs, from which defendant appealed to the County Court, where the action was dismissed and afterwards a new trial granted: *held*, that it was doubtful whether the Supreme Court had jurisdiction of an appeal from this order, and the point was left open for further consideration. *Id.*

See EVIDENCE, 3-5; CRIMES AND PUNISHMENTS, 3; WITNESS, 27.

NOTICE, ACTUAL AND CONSTRUCTIVE.

See EJECTMENT, 6, 7; PROBATE COURT, 4; MORTGAGE, 14; LIENS, 3.

OATH.

See ATTORNEY.

PARTIES.

See PLEADINGS, 14; EJECTMENT, 9.

PARTNERSHIP.

1. A deed of trust made by a debtor in favor of his wife at a time when he is insolvent and his property under attachment, is fraudulent and void as to creditors. *Burpee v. Bunn*, 194.
2. Partnership debts must be first paid from the partnership property before any portion of it can be applied to the payment of the individual debt of a copartner. *Id.*
3. Where one of several partners sells his undivided interest in the partnership property, the purchase money stands in the place of the property, and is liable for the partnership debts, the same as the property for which it was paid. *Id.*

4. A separate creditor of one of several partners levied an attachment for his debt upon the partnership property, and afterwards made an agreement with a trustee, to whom his debtor had conveyed the property, by which the latter stipulated to pay the attachment debt from the proceeds of a sale of the property, after paying expenses and prior claims: *held*, that neither by his attachment, nor by the agreement, did the separate creditor acquire any title to, or lien upon, the property, as against the superior equity of a subsequently attaching creditor of the partnership. *Id.*

PATENT.

1. No well-considered decision of this Court ought to be overruled unless it clearly violates some established rule of law, and great evils are likely to flow from suffering it to stand as a rule of property. It is an additional reason for standing by a decision that it was based upon the construction of a statute and affects titles to real estate. *Pioche v. Paul*, 105.
2. *Lathrop v. Mills* (19 Cal. 513), deciding that the Statute of March 26th, 1856, limiting the time for commencing actions by a patentee was, in this respect unconstitutional, affirmed on the principle of *stare decisis*. *Id.*
3. In an action of ejectment one of several defendants, who in his answer disclaims all right, title, and interest in the premises, but also denies all the allegations of the complaint, and avers that "he was and still is lawfully seized and in possession" of the land claimed, is a proper party, and is not entitled to have the action dismissed as to himself. *Id.*
4. Where the plaintiff in ejectment derives title from a United States patent issued upon confirmation of a Spanish or Mexican grant, the defendant will not be permitted to introduce proof of the invalidity of the grant for the purpose of impeaching the patent. *Id.*
5. Pending proceedings to obtain confirmation of a Mexican grant the claimants conveyed the land to H. and took back a mortgage to secure the purchase money, and afterwards commenced an action to foreclose the mortgage, and before decree assigned the same to M. At the sale under the decree the claimants bid off the property and in due course obtained the Sheriff's deed, and subsequently, upon confirmation of the claim, a patent. In an action of ejectment by a grantee of the patentees against P., the defendant objected that by the transaction above stated the patentees had parted with the title, and that plaintiff took nothing by his conveyance from them: *held*, that the title conveyed by the patentees to H. was revested in them by the Sheriff's deed, and that any equitable rights of M. in the premises afforded defendant no ground for impeaching that deed in this action. *Id.*

See EVIDENCE, 6, 7.

PENALTY.

See EXECUTION.

PLEADINGS.

1. A complaint, in an action to recover personal property, averred that the plaintiff was the owner and possessor of the property at the time of the taking by

defendant. The answer denied this allegation, and in addition averred affirmatively, that the property was at that time, owned and possessed by a third person: *held*, that this averment was but another form of denial and not new matter which, under the system of replication formerly in force, was admitted by a failure to reply. *Woodworth v. Knowlton*, 164.

2. Where an allegation in a verified complaint embraces several distinct propositions, stated conjunctively, a denial, in the answer, of the entire allegation, following the language of the complaint, is insufficient and raises no issue. *Id.*
3. Thus where the form of the allegation was that defendant "unlawfully and wrongfully seized and took said property into his possession from said plaintiff," and the denial was "that he (defendant) wrongfully and unlawfully seized, took, or carried away the said property:" *held*, that the fact that defendant took the property from the plaintiff was not denied but admitted. *Id.*
4. Certain personal property owned by plaintiff, but which had been used by A. & G. under a contract of hire, was seized by the Sheriff from the possession of the plaintiff by virtue of an attachment against G., subsequent to which plaintiff having made a demand for the property upon the Sheriff, but not upon A. & G., commenced this action against the former for its recovery: *held*, that the demand, if necessary at all, was properly made upon the defendant in whose possession the property was at the time. *Id.*
5. In pleadings, statements of mere conclusions of law are insufficient; the facts from which the conclusion is to be drawn must be stated. *Levinson v. Schwartz*, 229.
6. In an action of assumpsit, for goods sold and delivered, after a submission of the case upon the pleadings, defendants asked leave to amend their answer, which as it then stood raised no issue, by averring that the goods were purchased "on credit," and that the "term of credit" had not expired, which the Court refused: *held*, that the refusal was proper, as the averment proposed was only a conclusion of law, and therefore immaterial. *Id.*
7. A general denial of the averments of a verified complaint with the qualifications of "except as hereinafter admitted," is insufficient to put in issue any of its allegations. *Id.*
8. After an admission of the indebtedness charged in a complaint in assumpsit, a denial of the alleged promise to pay is immaterial. From the indebtedness admitted the law implies a promise to pay, and the denial of any express promise raises no issue that requires proof on the part of the plaintiff. *Id.*
9. A complaint which contains no other designation of the party plaintiff than the name of a copartnership firm is defective; but such defect can only be made available to defendant by demurrer for defect of parties, or by denial in the answer of any cause of action and objection thereunder to evidence in support of the claim. *Gilman v. Cosgrove*, 366.
10. An amended answer supersedes the original and destroys its effects as a pleading. *Id.*
11. A count in a complaint in the old form of assumpsit for money had and received, in which the promise is laid of a day more than two years prior to

the commencement of the action, is demurrable on the ground that it shows the demand to be barred by the Statute of Limitations. *Keller v. Hicks*, 457.

12. The assignor of a county warrant, who transfers the same by indorsement, is not liable to the assignee as an indorser of negotiable paper, nor as an assignor of an instrument in writing promising to pay money, or acknowledging money to be due, under the statute relating to bonds and due bills. *Id.*
13. *Dana v. San Francisco* (19 Cal. 486) affirmed on this point. *Id.*
14. The husband of a married woman is properly joined with her as a party defendant in an action upon a partnership obligation contracted by the wife and third persons as partners previous to the marriage and while she was a *femme sole*. *Id.*
15. A complaint which contains a count setting forth the facts attending the purchase of a county warrant by plaintiff, and charging that defendants are liable upon an implied contract to repay the purchase money, and a second count charging defendants as indorsers of negotiable paper, and a third count in the usual form for money had and received, is not demurrable on the ground of a misjoinder of causes of action. *Id.*
16. A county warrant drawn by the Auditor, directing the Treasurer to pay to H. & Co. nine hundred and sixty-five dollars for services as county printer, was for a valuable consideration indorsed by H. & Co. to F., and by F. transferred to plaintiff for nine hundred and sixty-five dollars paid by the latter. The warrant was in fact illegal and valueless, and payment being for this reason refused by the Treasurer plaintiff instituted the present action against H. & Co. and F. to recover back the amount paid by him, setting up in the complaint the foregoing facts, and that defendants, at the time of their transfers, represented that the warrant was valid and would be paid on presentation: *held*, on demurrer, that the complaint stated a cause of action, and that on the facts alleged plaintiff was entitled to recover from defendants the money which he had paid for the warrant. *Id.*
17. Action to determine an adverse claim to land, the complaint averring that plaintiff who was in possession, deraigned title through a deed from G. Answer that previous to the execution of G.'s deed the land was attached at suit of a creditor of his, and was subsequently in due course sold by the Sheriff, at which sale defendant became the purchaser. Replication that a portion of the debt on which the attachment issued was secured by a collateral note, and that the attachment was therefore void: *held*, that on these pleadings, in the absence of proof, judgment was properly entered for defendant; that if plaintiff had the right to attack the attachment in this form (a point not decided) the burden of the proof was on him to show that the attachment debt was collaterally secured. *Bostwick v. McCorkle*, 669.
18. Where the transcript contained, together with the judgment roll, a copy of an order, certified to by the Clerk, sustaining a demurrer to a replication, and there was no statement or bill of exceptions: *held*, that the Appellate Court could not review the action of the Court below upon the demurrer. *Id.*
19. Several defenses, inconsistent with each other, may, under proper circumstances, be set up in a verified answer. *Bell v. Brown*, 671.

20. In an action to recover a mining claim the complaint, duly verified, alleged title and possession in plaintiffs on a certain day. The answer, also verified, denied that plaintiffs ever had either title or possession, and afterwards averred that if plaintiffs ever had a title to the claim they had abandoned and forfeited it before defendants' entry. At the trial, on motion of plaintiffs, the Court ordered defendants to elect on which of the above defenses they would rely, and defendants having, after excepting to the order, elected to rely upon their denial were precluded from introducing proof of the abandonment and forfeiture: *held*, that the action of the Court was error; that defendants had the right to set up both defenses in their answer and support both by proof. *Id.*
 21. The inconsistent defenses which are allowed to be pleaded in a verified answer are not such as require in their statement a direct contradiction of any fact elsewhere directly averred. They are those in which the inconsistency arises rather by implication of law, being in the nature of pleas of confession and avoidance as contradistinguished from denials, where the party impliedly or hypothetically admits, *for the purpose of that particular defense*, a fact which he notwithstanding insists does not in truth exist. *Id.*
 22. If a fact, which is directly averred in one part of a verified pleading, is in another part directly denied, whether it be in the statement of several causes of action in a complaint or of several defenses in an answer, the party verifying it is guilty of perjury, and on the trial that averment which bears most strongly against the pleader will be taken as true. *Id.*
 23. In an action of ejectment one of the material allegations of the complaint is that plaintiff was the owner and entitled to the possession *at the time of the alleged entry by defendant*, and under a direct denial of this averment the defendant may show that, previous to his entry, a title which once existed in the plaintiff had been lost by abandonment or forfeiture. *Id.*
- See CONTRACT, 3; AMENDMENTS; REPLEVIN, 4; RECEIVER, 2; WITNESS, 1, 2, 15, 16; INDORSE AND INDORSEE, 1, 7; ESTATES OF DECEASED PERSONS, 7, 8; SOLE TRADER, 5; SALE, 1; LIENS, 1, 2; DIVORCE; HOMESTEAD, 3; PROMISSORY NOTES; APPEAL, 10, 13.

POSSESSION.

See MORTGAGE, 14; MINERAL LANDS, 2; EVIDENCE, 6.

PRACTICE.

1. In a proceeding by motion under Sec. 224 of the Practice Act to compel payment by a delinquent purchaser at judicial sale, the statement of the Sheriff upon which the motion is based need not state in terms that "loss was occasioned" by a failure to pay the amount bid. An averment of the amount of the bid and a re-sale at a specified smaller amount is sufficient. *Johns v. Trick*, 511.
2. Affidavits or documents copied into the transcript on appeal, but not made part of the record, either by a certificate of the Clerk or Judge, or by a statement or bill of exceptions, cannot be considered. *Gordon v. Clark*, 533.
3. As a general rule an objection which, had it been taken in the Court below,

might there have been obviated by amendment, cannot be raised for the first time in the Appellate Court. *Id.*

See WITNESS, 4, 5; INJUNCTION, 1, 3; REFERENCE, 1; EJECTMENT, 13; APPEAL, 2, 4-7; GARNISHMENT, 2.

PREScription.

See DEED, 25, 26.

PROBATE COURT.

1. Where it has been shown in proper form to the Probate Court, that a sale of personal property of an estate is necessary to pay the debts, a statement in the order of sale that it is "perishable property and liable to assessment and taxation," may be treated as surplusage, and does not vitiate or affect the character of the order. *Halleck v. Moss*, 266.
2. The validity of a sale of personal property made under an order of the Probate Court, cannot be attacked in a collateral action on the ground of an irregularity or defect in the order of sale, or proceedings under it. They can only be impeached by a direct action brought for that purpose. *Id.*
3. Thus, in an action upon an indemnity against loss in a sale of stock by executors: *held*, that the defendants could not question the regularity of an order of sale made by the Probate Court, or of the sale made in pursuance thereof. *Id.*
4. Where the defendant covenanted with executors, that if, in the course of administration of the estate, certain stock should be sold at public auction "upon reasonable notice," and should bring less than a certain amount, he (defendant) would pay the deficiency: *held*, that by the term "reasonable notice," was meant the general notice required in such sales by the Probate Act, and not any other or personal notice. *Id.*
5. An action upon a written agreement to pay money upon demand, may be maintained without any previous actual demand. *Id.*
6. In an agreement by defendant to indemnify the plaintiffs against loss upon a sale of stock, the former covenanted that if the proceeds of a sale were less than a certain amount, he would "make good the deficiency, *on demand*, after the said sale:" *held*, that an action for the deficiency might be maintained at any time after the sale, without a previous demand. *Id.*

See WILL, 7, 10.

PROMISSORY NOTE.

1. The execution of a promissory note, signed with an X or mark, may be proved by evidence of admissions of the alleged signer, in the absence of any attesting witness. *Hilborn v. Alford*, 482.
2. A note was executed by the defendant, payable to "the Board of Trustees of the Sonoma Academy or their successors in office," and specified that "no change in the name, character, or management of the said academy" should affect the liability of the payor. The complaint of the "Cumberland College" stated that the plaintiff was a corporation, and the same institution of

learning formerly known as the "Sonoma Academy;" that the academy was, after its establishment, changed to "Cumberland College," and that the note was the property of the plaintiff: *held*, that this complaint showed a good cause of action in the plaintiff, and that a demurrer to it was improperly sustained. *Cumberland College v. Ish*, 641.

PUBLIC LANDS.

1. Pending an appeal to the Commissioner of the General Land Office, from the decision of a United States Land Register, in a contest between a person at whose request the State Locating Agent has made a selection in the United States Land Office, in conformity with the School Land Act of April 23d, 1858, and a person who, before the issuance of a certificate of purchase, had interposed before the Register a claim as preëmtor, the rights of the applicant for location are suspended and preserved, and until the final decision no other location of the same land can be made to his prejudice. *Dolhequy v. Tabor*, 279.
2. In the case above stated, no payment of the twenty per cent. of the purchase money to the treasurer of the county need be made by the applicant until the appeal is determined, and the result known at the Register's office. *Id.*
3. Where, pending the appeal in the above case, a third person, with full knowledge of its pendency and the rights of the first applicant, procures the issuance to himself of a certificate of purchase under the same act, he will be deemed to hold the certificate in trust for the former applicant in whose favor the appeal is decided, and may be compelled by bill in equity to transfer it to him upon being reimbursed his expenses. *Id.*

See MINERAL LANDS, 2, 3; ABANDONMENT, 1, 4.

REAL ESTATE.

See MORTGAGE, 23.

RECEIVER.

1. The purchaser at judicial sale of a mining claim may, where the judgment debtor remains in possession, working the claims, and is insolvent, have a receiver appointed to take charge of the proceeds during the period allowed by statute for redemption. *Hill v. Taylor*, 191.
2. The complaint stated that at a foreclosure sale plaintiff purchased an undivided one-third interest in a tract of mining ground; that the mortgagor was in possession and insolvent, and in connection with the owners of the other interests was working the claim and taking the proceeds; that before the expiration of the period of redemption the claim would be worked out and its value destroyed, and prayed judgment for the amount already received by the debtor since the sale, and that during the period of redemption a receiver be appointed to take charge of the proceeds: *held*, that on the facts stated plaintiff was entitled to the relief sought, and that an order sustaining a general demurrer to the complaint was erroneous. *Id.*
3. The working of mines is something more than the ordinary use of real estate by one in possession, and requires the use of more than ordinary remedies to

protect the rights of the purchaser at a judicial sale. It may probably be restrained as waste, under Sec. 235 of the Practice Act, but the appointment of a receiver is the more appropriate remedy, as it permits the continued working of the claims. *Id.*

REDEMPTION.

See MORTGAGE, 6.

REFEREE.

1. The provision of Sec. 187 of the Practice Act, as to the time within which a referee must file his report, is merely directory. A failure to file within the time will not invalidate the report or the judgment rendered thereon. *Keller v. Sutrick*, 471.
2. A finding of fact by a referee will not be set aside where the evidence is conflicting. *Id.*

REMITTITUR.

See JUDGMENT, 4, 5.

REPLEVIN.

1. Replevin lies for all goods and chattels unlawfully taken or detained, and may be brought whenever one person claims personal property in the possession of another, and this whether the claimant has ever had possession or not, and whether his property in the goods be absolute or qualified, provided he has the right to the possession. *Lazard v. Wheeler*, 139.
2. Where personal property is wrongfully detained, the owner may assign his title thereto, and the assignee may maintain an action therefor. *Id.*
3. A right of action for the wrongful taking and conversion of personal property is assignable, and under the provisions of the code the assignee can recover upon the same in his own name. *Id.*
4. The complaint averred that defendant wrongfully took and detained from one Johnson certain county warrants owned by the latter; that subsequently Johnson assigned to plaintiff his right in the warrants and the moneys which might be made on the same; and, that after this assignment plaintiff demanded the warrants from defendant who refused to deliver them: *held*, that this complaint stated a sufficient cause of action; that as assignee of Johnson, plaintiff was entitled to recover the warrants or their value with damages for detention accruing after the assignment. *Id.*

See PLEADINGS, 1, 4.

RESTITUTION, WRIT OF.

1. Under a writ of restitution issued upon a judgment in favor of the plaintiff, in an action of ejectment, it is the duty of the officer serving the writ to remove from the premises the parties defendant and all persons who have derived possession from them since the commencement of the action, with notice actual or constructive, and also all other persons, although not parties or in privity with them, who have acquired possession subsequent to the filing of a *lis pendens* in the action, or with actual notice of its pendency. *Fogarty v. Sparks*, 142.

2. A person in possession of the premises at the time of the commencement of the action of ejectment, unless made a party defendant, is not affected by the judgment, nor can he, or those holding under him, be dispossessed by a writ of restitution issued thereon. *Id.*
3. In an application for *mandamus* to compel a Sheriff to remove from possession of the premises, under a writ of restitution, an occupant who was not a party to the action, it must be shown distinctly by the affidavits that his possession was acquired under the parties or subsequent to the filing of a *lis pendens*. If these matters are left in doubt the application will be denied. *Id.*

See EJECTMENT, 3, 4.

ROADS.

1. A person through whose land a road has been projected, in accordance with the provisions of the road law of 1861, and who presents his claim for damage to the road viewers, must thenceforward pursue the remedy pointed out by that statute, by either accepting the award of the viewers, agreeing with the Board of Supervisors, or commencing within the time limited an action against the county. By neglecting to follow the statutory remedy, he waives his claims and is barred from bringing any action for damages. *Harper v. Richardson*, 251.
2. Road viewers, under the Act of 1861, located a road through the land of plaintiff, who presented a claim for damages in the sum of three hundred dollars. The viewers awarded him no damages, and he took no steps to agree with the Board of Supervisors or to sue the county, but several months afterwards, the Supervisors having established the road as a highway and ordered the owners to open the same, he commenced the present action against the latter to enjoin their proceeding: *held*, that the action could not be maintained—that plaintiff having become a party to the proceeding, now limited to the statutory remedy, and that by his failure to sue the county within the time prescribed, he had waived all claim for damage. The provisions of the road law of 1861, prescribing the mode for obtaining compensation by parties through whose land a road is located, are constitutional. *Id.*

SALE.

1. A verified answer, which, in any part contains a distinct denial of a fact material to plaintiff's recovery, cannot, whatever its defects, be treated as a nullity so as to entitle plaintiff to judgment on the pleadings. *Ghirardelli v. McDermott*, 539.
2. As between the parties to a sale of goods on store in a warehouse, the delivery of an order on the warehouseman for the goods by the seller to the buyer is a delivery, and passes the title to the latter so as to render him liable for the price. *Id.*
3. Where a sale of goods was made through a broker and perfected by delivery of an order for the same upon a warehouseman, which order the buyer shortly after returned to the broker to deliver to the seller, with notice that the goods would not be taken, and the broker tendered the order to the seller, who refused to receive it: *held*, that the broker, in receiving the order from the

buyer, acted as his agent, and that the reception of it by him did not effect a rescission of the contract. *Id.*

SCHOOL LANDS.

1. The provisions of the amendatory School Land Act of April 22d, 1861, requiring that the proceeds of sales of the sixteenth and thirty-sixth sections shall constitute a State fund instead of being applied for the benefit of the townships in which the lands are situated, is constitutional and valid. It is not in violation of the grant made by Congress, nor, in requiring the interest upon previous sales made under the Act of 1858 to be transferred to the State fund, does it impair the obligation of a contract. *Wyman v. Banvard*, 524.
2. The School Land Act of 1858 is not a grant of the interest money to the several townships, but merely a provision as to the manner in which a certain fund shall be appropriated, and subject, therefore, to the future control of the Legislature. *Id.*
3. Certificates of purchase issued by the State Register for school lands and certificates of location issued by the State Locating Agent are, under the Statute of April 13th, 1859, *prima facie* proof of legal title in the holder, and are admissible as evidence in his favor in an action of ejectment. *Richter v. Riley*, 639.

SET-OFF.

1. M. & T. being indebted to V. in the sum of six hundred and seventy-one dollars, plaintiff, for the accommodation of the debtors, procured E. to assume the debt and execute to V. his (E.'s) note for the amount, and to secure E. plaintiff assigned to him a note and mortgage of M. for \$2,000, with an agreement that the latter should be re-transferred to plaintiff upon the payment by him to E. of the amount of his (E.'s) note to V. Subsequently, E. died, having in his hands at the time \$1,400 belonging to M., and received by E. as rents and profits of a certain ditch of which he and M. were joint owners. Defendants were appointed administrators of E. and received the \$1,400 as assets of deceased, and afterwards from the funds of the estate paid the six hundred and seventy-one dollar note to V. The action is brought to compel defendants to re-deliver to plaintiff the \$2,000 note and mortgage, he claiming that the transaction above stated amounted to a payment by him of the debt for which they had been pledged as security: *held*, that the facts did not show a payment of E.'s note to V. by plaintiff; that they only established that there was a balance due to M. from the estate of E., and that plaintiff was not authorized in this action to avail himself of such counter claim of M. against the estate as a payment on behalf of M. & T. *Cook v. Davis*, 157.
2. An assignee of a judgment, although a purchaser for a valuable consideration and without notice, takes subject to a right of set-off against the judgment existing at the time of the assignment. *Porter and Allen v. Liscom*, 430.
3. Where in the same action two judgments were entered, one for the plaintiff for a certain sum and one for the defendant for a less sum: *held*, that defendant had a right to set off his judgment *pro tanto* against that of the plaintiff, and that this right could not be defeated by any assignment by plaintiff of his judgment before application for the set-off. *Id.*

4. Where a judgment, against which a right to set off another judgment rendered in the same action exists, is assigned, the assignee may be brought into the Court upon a proceeding by petition and motion, and will be bound by an order made therein directing a set-off. *Id.*
5. A judgment in favor of a defendant for costs based upon a finding of one of several issues in his favor by the jury, even if erroneous, is not void. While unreversed it is to be treated, for the purpose of set-off, as a valid judgment. *Id.*

SOLE TRADER.

1. Real estate conveyed to the wife during coverture by a conveyance in the usual form of a deed of bargain and sale, is, *prima facie*, the common property of herself and husband. If the wife claims property thus conveyed to be her separate property, the burden of proof is on her to show the fact. *Adams v. Knoulton*, 283.
2. Community property is liable for the debts of the husband. *Id.*
3. A declaration of a married woman, under the Sole Trader Act, must state : 1st, that she intends to carry on some certain business—specifically describing it ; 2d, that she intends to carry on such business in her own name ; and 3d, on her own account. These three facts are essential, and a declaration which omits either is fatally defective, and will not entitle the declarant to the privileges of a sole trader. *Id.*
4. A declaration in the following form : “ State of California, County of Nevada—H. Adams, resident of Nevada City, and wife of P. Adams, hereby declares that she intends to carry on the business of Restaurant and Hotel Keeping, accommodating boarders and lodgers, in the City of Nevada, and from this date will be individually responsible, in her own name, for all debts contracted by her on account of her said business ; that the amount of money invested in said business does not exceed or equal five thousand dollars. (Signed) H. Adams,” and sworn to and acknowledged, is insufficient, and will not sustain a claim of the declarant to hold, as a sole trader, property subsequently conveyed to her for the purposes of the business mentioned, as against an execution creditor of her husband. *Id.*
5. A complaint, in an action to recover a debt from a married woman, which charges that she is a sole trader under the statute is sufficient, without any averment of facts showing that the debt was contracted in the particular business which she had declared her intention to carry on. *Melcher v. Kuhland*, 522.
6. The fact that a married woman is a sole trader and contracts a debt, raises the presumption that the debt is contracted on account of her business as a sole trader. *Id.*

STARE DECISIS.

See PATENT, 1, 2.

STREETS.

1. P. executed to the City of San Francisco a quitclaim deed of certain strips of land to be used as public highways, under the name of “ Belle Air Place ”.

and "Pfeiffer Street," the same being part of a city lot occupied by himself and wife as a homestead. Afterwards, the parcels thus sold never having been opened or used as highways, P. and wife executed a mortgage upon their homestead, describing it as bounded in part by a line running a certain course and distance "to Belle Air Place," and thence a certain course and distance "to Pfeiffer Street." The mortgaged premises having been sold under a decree of foreclosure in an action to which the husband and wife were parties, and the plaintiff having acquired the title of the purchaser, the mortgagors commenced to erect a building upon the spaces designated as streets, claiming that the same remained a part of their homestead and had not been dedicated as highways. In an action by plaintiff to enjoin this work: *held*, that as to the mortgagees and those claiming under them, the mortgage was a dedication of the streets named as public highways, and vested in them a right of way; that the deed to the city might be referred to, to show the width of these streets; that the homestead claim was barred by the foreclosure and sale; and that the right of way passed to the purchasers as an appurtenance of the lot, and therefore free from the claim of homestead. *Kittle v. Pfeiffer*, 484.

2. Injunction is the proper remedy to stay a threatened injury to a right of way. *Id.*
3. Where land is described in a conveyance as running to a certain street, without other qualifications, the fee passes to the center of the street. *Id.*
4. Where lots are sold as fronting on or bounded by a certain space designated in the conveyance as a street, the use of such space as a street passes as appurtenant to the grant and vests in the grantee in common with the public the right of way over the same. *Id.*

SAN FRANCISCO.

1. East Street, San Francisco, extends from Folsom to Market Street, the latter and not Jackson Street being its northern terminus. *People ex rel. Burr v. Dana*, 11.
2. It is a cardinal rule of interpretation that a statute must be construed with reference to the objects intended to be accomplished by it. *Id.*
3. The object of the Act of 1851, commonly called the "Water Lot Act," was to provide for the disposition of the water lot property, and not to interfere with the location of streets; and the designation therein of one of the boundaries of that property as the "eastern line of East Street to its point of intersection with the northern line of Jackson Street," was not intended, nor did it operate to extend East Street northward to Jackson. *Id.*
4. *Jacobs v. Kruger* (19 Cal. 411) affirmed. *Id.*
5. Where an act of the Legislature, providing for the disposition of State property, exempted from its provisions that portion of the property "known as the Government Reservation," except as to certain leasehold estates therein which were confirmed: *held*, that whether the reservation had any legal existence or not, was immaterial; all that was known by that name being exempted from the operation of the act except as to the leases confirmed by it. *Id.*

6. The reservation attempted to be made on behalf of the United States Government in 1847, by the military officers then exercising authority at San Francisco, embraced all the lots lying between Montgomery Street on the west and deep water on the east, and by "deep water" was meant the place used as an anchorage for vessels, the intention being to fix the eastern boundary at some undefined point in the bay beyond the line of the city front. *Id.*
7. Where the Legislature, at the time of the passage of an act concerning water lots in San Francisco, had before it an official map of that city upon which was marked a selection called the "Government Reservation," to which map reference was made in the act: *held*, that the map must be regarded as a part of the act, and that the Legislature, in speaking of the reservation, must be presumed to have intended what was marked on the map as such. *Id.*
8. The Street Superintendent of San Francisco, under the Consolidation Act, has power to enlarge the time for completion of a contract for street improvements made by him, and if any property owner feels aggrieved by such action he must appeal to the Board of Supervisors, or he will be deemed to have acquiesced therein. *Conlin v. Seamen*, 546.
9. In a proceeding for the improvement of streets in San Francisco by contract, under the regulations of the Consolidation Act, the liability of the real owner is not released or affected by an erroneous assessment of the tax upon his property to another person. *Id.*
10. The complaint in an action by a contractor against a property owner, upon a contract for improving streets in San Francisco in pursuance of the provisions of the Consolidation Act, need not aver any special demand upon the defendant other than a compliance with the forty-ninth section of the act. *Id.*
11. *Conlin v. Seamen* (*ante*, 546), to the effect that the Superintendent of Streets of San Francisco has the power to extend the time for completion of contracts for the improvement of streets made by him, affirmed. *Houston v. McKenna*, 550.
12. The plaintiff in November, 1860, entered into a contract for the improvement of streets in San Francisco under the law of 1859, which provided that for payment an assessment should be levied upon the adjacent lots in proportion to their respective values. Before the completion of the work the Amendatory Act of 1861 was passed, providing for an assessment in payment of such contracts according to the street frontage of each lot: *held*, that the provisions of the law of 1859 respecting the mode of assessment was part of the contract, and that the assessment, though made after the amendatory act, must be in the mode prescribed by the old law. *Id.*
13. Under the Act of 1859 the Board of Supervisors of San Francisco have power to provide for the grading of all located streets, whether new or old, and as well of those lying east of Larkin Street as to the west of it. *Id.*

See JUDGMENT, 1.

TAXES.

1. Lands, within this State, belonging to the United States, are, both by the provisions of the State revenue law, and by the terms of the Act of Congress

admitting California into the Union, exempt from State taxation. *People v. Morrison*, 73.

2. In order to hold improvements upon public lands liable for a State tax the assessment must be upon the improvements *eo nomine* and not upon the land itself. *Id.*
3. All the provisions of the statutes for the assessment of taxes, and for the sale of property for their non-payment must, in their substance, be strictly pursued, in order that a title acquired at such a sale shall be valid. *Russell v. Mann*, 131.
4. Whenever a tax title is specially set forth in a pleading, it is necessary that every fact should be averred which is requisite to show that each of the statutory provisions has been complied with. This necessity is not obviated by the provisions making the tax deed proof of certain facts. *Id.*
5. In pleading a tax title, it is necessary to aver those facts which, by Secs. 18 and 22 of the Revenue Act of 1857, are required to be stated in the tax deed. *Id.*
6. A pleading, setting up a tax title, must aver distinctly for what year the tax was assessed, and failing to do so, is demurrable. *Id.*
7. It will not be inferred that a tax was levied for a certain year, from an averment that in that year the assessor entered the levy on the assessment roll. *Id.*
8. Whether, under the provisions of the Revenue Act of 1857, it would be sufficient, in pleading a tax title, to state that the property "was assessed," without stating the acts done to constitute the assessment, or the officer by whom, or time of year when done—*Query?* *Id.*
9. The constitutional provision, "that taxation shall be equal and uniform throughout the State," is not violated by a Revenue Act exempting from taxation church and school lands, and lands of the United States. *Hugh v. Shoemaker*, 363.
10. The omission in the Revenue Act of 1857, to tax all the lands in the State, did not render the act void for unconstitutionality. *Id.*
11. The provisions of Sec. 13 of the Revenue Act of 1857, that the Tax Collector shall add to the tax of a delinquent five per cent. and enforce the collection of the same, in connection with the tax, by sale of the property, is constitutional, and a sale made in pursuance thereof passes a valid title. *Id.*
12. The five per cent. is not a substitute for the tax or a penalty for its non-payment, but one of the means prescribed for obtaining the tax itself by offering an inducement to pay it when due. *Id.*
13. The constitutional provision that no person shall be deprived of his property without due process of law, is not applicable to proceedings by the State to obtain from citizens their proper contributions to the expenses of administering the Government. Long-established practice, under a similar provision in other Constitutions, had fixed this qualification to the meaning of that clause at the time our Constitution was adopted. *Id.*

14. Under the Revenue Act of 1857 the assessment of lands outside of a city or incorporated town need not describe the land by metes and bounds. *Id.*
15. A description of land in an assessment roll as follows: "Four hundred acres of land situated on the Volcano and Jackson Road, in Township No. 1, of the County of Amador and State of California, and commonly known as the 'New York Rancho.'" *held*, to be sufficient under the Revenue Act of 1857. *Id.*
16. The purchaser of property in San Francisco at a sale for the taxes of 1858 is not entitled to an injunction restraining a sale of the same property for the unpaid taxes of 1857. *Cowell v. Washburn*, 519.
17. Under the Revenue Law of 1854, the lien of the State for State and county taxes attached on the first day of March of each year, and continued until the tax was paid. Neither a failure by the officer to include a delinquent tax of one year with the tax of the subsequent year, nor a sale of the property for the taxes of the succeeding year divested the lien for the prior tax. *Id.*

See ASSISTANCE, WRIT OF, 2; SAN FRANCISCO, 9, 10, 12.

TENANT IN COMMON.

See ASSISTANCE, WRIT OF, 3.

TRANSCRIPT.

1. Where the transcript on appeal from an order denying a new trial contains no statement, settled or agreed upon, the order will be affirmed. An allegation embodied in the transcript, as an assignment of errors by the appellant that the District Judge omitted to settle a statement which was submitted to him, cannot be taken as a substitute for a statement, nor does it constitute any reason for reversing the judgment. *Hoadley v. Crow*, 265.

See INSOLVENCY, 4; PLEADINGS, 18.

TRIAL.

See LIMITATIONS, STATUTE OF, 1, 2.

TRUST.

1. Where one person pays the consideration money for the purchase of land and the conveyance is made to another, the latter holds the title in trust for the person paying the consideration. *Bayles v. Baxter*, 575.
2. The fact that the party receiving a conveyance of land verbally agreed at the time with the person paying the consideration that the former should, upon demand, execute a conveyance to the latter of the premises, does not make the trust *express* as distinguished from one implied by law from the act of the parties, so as to exclude proof of it by parol under the operation of the Statute of Frauds. *Id.*
3. Whether the sixth section of the Statute of Frauds does not apply alone to the sale of lands as between grantor and grantee, and not to contracts for the purchase of land by one person for the benefit of another—*Query*. *Id.*

4. A resulting trust may be defeated as well as established by parol evidence. *Id.*

See MORTGAGE, 2; PUBLIC LANDS, 3; DEED, 23.

VENUE.

1. The principal place of business of a corporation is its *residence* within the meaning of that term as used in Sec. 20 of the Practice Act, fixing the place of trial. *Jenkins v. The California Stage Co.*, 537.
2. On application by defendant to change the place of trial on the ground of residence, the plaintiff may resist by showing that the convenience of witnesses and the ends of justice will be promoted by the retention of the cause, and the Court may, on a proper showing of such facts, refuse to change the venue. *Id.*

See MANDAMUS, 2, 3; AMENDMENTS, 4-6.

VERDICT.

See MINING CLAIMS, 3, 4; WITNESS, 1, 9.

WILL.

1. Where the Probate Court acquires jurisdiction to probate a will by the presentation to it of a proper petition for that purpose, and the publication of notice of time of proving the will, and afterwards in such proceeding admits the will to probate, its determination is final, except upon a direct proceeding by appeal or otherwise to reverse it, and cannot be questioned collaterally. *In Matter of Will of Warfield*, 51.
2. A proceeding by petition to the Probate Court to obtain an order that a former probate of a will therein be adjudged void, on the ground of want of jurisdiction, and that the will be admitted anew to probate, is not a direct proceeding to set aside the former probate, but a collateral proceeding, in which such former probate can only be attacked for want of jurisdiction, and not for irregularity. *Id.*
3. The existence and contents of a record or other document to show the regularity of legal proceedings, may, if the original be lost or destroyed, be shown by secondary evidence, the same as of any other lost instrument. *Id.*
4. The existence of a petition for the probate of a will which is not on file may, after the lapse of several years be inferred, from mention thereof in the minutes of the Probate Court and reference thereto in books kept by the Clerk and papers on file, and oral testimony tending to prove, but not positively asserting the fact. *Id.*
5. Where it was shown that a petition, since lost or destroyed, was filed in the proper Court, the object of which was to procure the probate of a will; that the testator was dead when the petition was presented, and resided at the time of his death in the county where the alleged probate was had; that the petition was drawn by lawyers whose business it was to prepare such papers; that the Court assumed jurisdiction; took proof of the execution of the will; issued letters testamentary, and ordered and approved a sale of real estate by the

- executor: *held*, that it should be presumed, after the lapse of eight years, that the petition contained a statement of the necessary jurisdictional facts. *Id.*
6. A failure to make the order admitting a will to probate on the day specified in the notice, or to fix, by adjournment of the proceeding, a subsequent day for the order, is a mere irregularity, and does not affect the jurisdiction. *Id.*
 7. It is not necessary to the validity of a probate that a formal judgment or decree, that the will is admitted to probate or is proved, should be entered; a direct statement that the will is proved, although entered in the minutes as part of and preliminary to an order directing letters to issue, is sufficient. *Id.*
 8. Courts will uphold where it is possible a contemporaneous interpretation of a statute under which interpretation rights of property have for many years been acquired. *Id.*
 9. The omission by the Probate Court of San Francisco in its proceedings in probating wills previous to 1855, to attach to the will and file with it for record the certificate mentioned in Sec. 24 of the act concerning estates of deceased persons, is not a fatal defect, invalidating the probates of that period. *Id.*
 10. A judgment admitting a will to probate, made upon a petition stating all the necessary facts, and after the publication of due and legal notice of the application for probate, is conclusive of the validity of the will when called in question in any collateral proceeding or action. *Rogers v. King*, 71.
 11. No petition is required as the foundation of a proceeding to probate a will; a petition is only necessary under the statute where the executor named therein accepts the trust, and then not for jurisdictional purposes. *In Matter of Estate of Howard*, 395.
 12. The jurisdiction in a proceeding to probate a will depends upon certain facts which the Court, on reviewing the will, must inquire into and determine; and the mere possession of the will vests the Court with all the authority necessary for that purpose. *Id.*

WITNESS.

1. A notice, under Sec. 422 of the Practice Act, of the intention of a party to be examined as a witness in his own behalf, need not state each particular fact, or all the evidence in full, which the party intends to state in his testimony. It is sufficient if it states the several subjects, or each particular subject matter respecting which the party is to be examined. *Bond v. Dorn*, 113.
2. Thus in an action for the diversion of water, the notice for plaintiffs to testify, stated the points upon which they would be examined with about the same definiteness and particularity as is required in making issues in a pleading: *held*, that the notice was sufficient, and that the refusal to permit the plaintiffs to be examined was error, for which a new trial would be granted. *Id.*
3. The right of a party to an action to testify therein on his own behalf depends entirely upon the statute. *Reddington v. Waldon*, 185.
4. Where an act amending the laws of practice is passed to take effect at some future time, judicial proceedings, intermediate between the passage and the time of taking effect, are governed by the old law. *Id.*

5. The Act of 1861, amending Sec. 422 of the Practice Act so as to permit parties to testify on their own behalf, was approved May, 1861, but by a general law did not go into effect until sixty days after its passage. In an action tried on the thirteenth day of July, 1861, the defendants were admitted as witnesses on their own behalf, in accordance with the provisions of the amendment, to which plaintiffs excepted: *held*, that this was error, for which a judgment in favor of defendants must be reversed. *Id.*
6. Where, on appeal from a judgment in favor of defendants, error is disclosed in the admissions on the trial of improper evidence in defendants' favor, the judgment will be reversed and a new trial ordered without considering whether or not the plaintiff proved a case entitling him to relief. *Id.*
7. A complaint which avers substantially that the defendant was at a certain time indebted to the plaintiff in a certain sum for professional services rendered at the special instance and request of the defendant, is sufficient without stating in terms the value of the services or that the defendant promised to pay. *Wilkins v. Stidger*, 231.
8. The promise to pay alleged in the common count in assumpsit, was a mere conclusion of law from the facts stated, and need not be averred under the new code, which requires only the facts to be stated. *Id.*
9. In an action by the assignee of an account, unliquidated demand, or thing in action, not arising out of express contract, the assignor cannot be made competent as a witness for the plaintiff by giving the notice of intention to testify provided for in Sec. 422 of the Practice Act as recently amended. The clause in the latter section which speaks of an assignor of a thing in action or contract, includes only such persons as were permitted to testify under the provisions of Sec. 4, and not those prohibited by it. The amendments to Sec. 422 do not in any way extend the right of examining an assignor. *Id.*
10. A party to an action is not bound by, or held to admit as true, statements made by his witnesses during the trial of a cause, because he does not deny or contradict them at the time. *Id.*
11. In order to affect a person by conversations or declarations made in his presence they must be made to him in such a manner as requires him to deny or, by his acquiescence, to admit them. *Id.*
12. In an action by S. against a stage company to recover damages for injuries sustained by the upsetting of a coach, the physician of S. was called by him as a witness to prove the value of his professional services as an element of damages. In a subsequent action brought by the physician against S., to recover for his services, the plaintiff offered proof of what he himself had testified as to their value upon the former trial, in connection with the fact that plaintiff was present and heard the evidence and made no objection to its correctness: *held*, that the evidence was inadmissible; that S. was not estopped from denying the truth of the evidence by having used it upon the former trial, for the reason that plaintiff had not been thereby influenced to do any act to his injury, and that S. was not bound by it, as an admission, for the reason that under the circumstances he was not called upon to admit or deny its truth. *Id.*
13. Admissions of fact by counsel in one action, whether made during the hearing

of the evidence or upon the argument, are not admissible in evidence against the client in another action. *Id.*

14. The doctrine of acquiescence does not apply to proceedings on trials of controversies, because it is not the right or duty of a party to interrupt the order of proceedings in such cases by denials or contradictions, and his silence cannot, therefore, under such circumstances, be deemed an admission. *Id.*
15. The complaint charged a trespass against "C. D. Thompson and the other owners or claimants of the Paul Thompson Quartz Lode." Thompson alone was served with summons, and an answer was filed on behalf of "defendants," without naming them. One Trainovitch was offered as a witness for the defense, and stated that at the time of the commencement of the action he owned an interest in the Paul Thompson Lode and had agreed to pay his proportion of the costs: *held*, that Thompson was the only defendant in the action, and that a release from him to the witness rendered the latter competent. *Real del Monte C. G. & S. M. Co. v. Thompson*, 542.
16. In an action of trespass for injury to a quartz lode, when T. alone was made a defendant, and by his answer took issue upon the title, an owner of a part of the same lode who had since the commencement of the action but before trial sold his interest in the lode for a price contingent on the validity of his title thereto: *held*, to have no interest which disqualified him as a witness for the defense, as it does not appear that the judgment in this action will affect or determine the title to the part thus sold. *Id.*
17. Error, in refusing to permit a witness to answer a proper question, becomes immaterial by the introduction of the same matter to which the question was pointed, under a subsequent interrogatory. *Id.*
18. In an action to recover the price of personal property where one of two defendants makes default and the other answers denying the purchase, the defaulting defendant is not a competent witness for the plaintiff to show that his co-defendant was his partner, and as such jointly with him purchased the property. *Fairchild v. Amsbaugh*, 572.
19. The finding of a jury upon a fact which they are so peculiarly fitted to decide as the genuineness of a signature to a conveyance, will rarely if ever be interfered with on the ground that such finding is not warranted by the evidence. *Wright v. Carillo*, 595.
20. A witness will not be presumed to be interested because he is shown to have executed a deed to the party calling him of the land in controversy, where the deed itself is not produced, and no proof is made as to the covenants which it contained. The Court will not presume that the deed contained covenants of warranty. *Id.*
21. A grantor to whom his grantee still owes a portion of the purchase money may remove his interest in the controversy between the latter and a third person as to the title by executing to the grantee a formal release of all claims for the balance due. *Id.*
22. The decision in *Peabody v. Phelps* (9 Cal. 213), to the effect that an action for a false and fraudulent representation as to the naked fact of title in the vendor of real estate, cannot be maintained by the purchaser who has taken posses-

sion of the premises sold under a conveyance with express covenants; and that if a party takes a conveyance without covenants, he has no remedy in case of failure of title—commented on and its correctness when applied to cases of fraud questioned. *Id.*

23. Under Sec. 422 of the Practice Act as amended in 1861, the vendee of the defendant and vendor of the plaintiff is, without regard to his interest, admissible as a witness for the plaintiff upon an issue as to the genuineness of the defendant's deed, where the latter has been examined upon that question on his own behalf. *Id.*
24. Where plaintiff claimed title through a deed purporting to have been made by the defendant to H. & N., the genuineness of which was denied by the answer: *held*, that a declaration of defendant that he had made a deed of the land to P., in connection with proof that P. had received no deed, and had negotiated respecting the purchase with N. & H., was admissible evidence for plaintiff as a circumstance tending to show that the defendant had actually made the deed to N. & H., and was probably mistaken as to the grantee. *Id.*
25. *Held*, further, that declarations made by defendant to H. a few days before the date of the deed, were admissible on the same grounds. *Id.*
26. Upon the trial of an issue as to the genuineness of a deed, the Court gave the following instructions to the jury: "If there is a reasonable theory consistent with the evidence by which the jury can find in favor of the genuineness of the deed, and consistent with the honesty and truthfulness of all the witnesses in the case, it is the duty of the jury to adopt that theory in preference to one by which perjury or forgery may be involved on the part of a portion of the witnesses:" *held*, that there was no error in giving this instruction. *Id.*
27. Where, upon the trial, the genuineness of a signature is put in issue and made the subject of proof, a new trial will not be granted on account of the discovery of new evidence tending to prove the signature a forgery. *Id.*

See DEPOSITION, 3, 4; JUSTICES OF THE PEACE, 3-5; CRIMES AND PUNISHMENTS, 4, 5; APPEAL, 11, 12.

WORK AND LABOR.

1. The presumption that the person enjoying the benefit of services rendered is bound to pay therefor what they are reasonably worth, may be rebutted by proof of a special agreement to pay a fixed amount, or in a particular manner, or by proof that the services were intended to be gratuitous. *Moulin v. Columbet*, 508.
2. In an action for personal services, defendants asked an instruction to the effect that if the plaintiff served the defendant upon an understanding that he was to have only his living—board, washing, lodging, etc.—as a compensation, and that he had received these, then defendant should recover, which instruction the Court refused: *held*, that the instruction was proper, and that for the error in refusing it the judgment for plaintiff must be reversed. *Id.*
3. The president of a corporation, who is also a stockholder, is, in the absence of any usage of the company to the contrary, entitled to compensation for his services as president. If the rate is not fixed by special contract, he is

entitled to what his services are reasonably worth. *Rosborough v. The Shasta River Canal Co.*, 556.

4. An understanding, not amounting to an agreement, between a corporation and its president that he should receive pay for his services is competent evidence to rebut any presumption that he was serving gratuitously. *Id.*
5. The plaintiff acted for two yearly terms as president of the defendant, a corporation, with an understanding that he should be paid, but without any agreement to that effect, or as to the amount of compensation. Having been reëlected, the trustees on the same day made an order as follows: "Ordered, that the compensation of the President of the Board of Trustees be established at fifty dollars per month;" and plaintiff continued to serve for two years longer: *held*, that the order was an agreement by the corporation to pay for plaintiff's past, as well as future services, at the rate of fifty dollars per month: *held*, further, that the order above mentioned was a contract in writing, within the meaning of the Statute of Limitations, to pay for plaintiff's past services, and that his demand therefor would not be bound by the statute until the expiration of four years from the date of the order. *Id.*
6. Where an officer of a corporation is elected for a term of one year, with a compensation at a certain sum per month, the Statute of Limitations does not begin to run against any portion of his claim for salary until the end of the year. *Id.*

